No. —

In the United States Court of Appeals for the Ninth Circuit

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, APPELLANT

v.

MARY R. BAIOCCHI, APPELLEE

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT AND APPENDIX

H. G. MORISON,
Assistant Attorney General,
FRANK J. HENNESSY,
United States Attorney,
C. ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellant.

Of Counsel:
EDWARD H. HICKEY,
HUBERT H. MARGOLIES,
Attorneys, Department of Justice.
LEONARD B. ZEISLER,
Attorney, Federal Security Agency.

FILED
MAY 1 1950
PAUL P. O'BRIEN,

INDEX

Page

Jurisdictional statement 1
Statement of the case 2
Specification of errors relied upon 9
Statutes and regulations involved 11
Questions presented 14
Legislative history of the 1939 amendment defining agricultural labor 15
Summary of argument 17
Argument:
I. Services after December 31, 1939 processing fruit in the employ of a farmers' marketing cooperative are within the scope and purpose of the broadened agricultural labor exception 22
A. The legislative history of the Congressional definition supports the exception of the services in question 22
B. The regulations of the Social Security Administration and of the Bureau of Internal Revenue for the tax counterpart substantially reproduce the language of the authoritative Committee Reports 34
C. The corollary of tax relief to small farmers marketing their fruits through cooperatives was the withdrawal of coverage from workers processing fruit for such cooperatives 36
D. Wage credits and five quarters of coverage have been allowed on account of work other than processing, such as maintenance 37
E. Within the framework of the Congressional definition of "agricultural labor," a farmers' marketing cooperative is not a market, much less a terminal market 38
F. *Miller* v. *Burger* and *Miller* v. *Bettencourt* are clearly distinguishable. *North Whittier Heights* v. *N. L. R. B.* is inapplicable where Congress has itself given "agricultural labor" an artificial statutory definition departing from previous decisional law 49
II. The regulations of the Bureau of Internal Revenue and the Social Security Administration take account of the necessity for a uniform administration of the tax and benefit provisions of the Old-Age and Survivors Insurance program, effectuate the intention of Congress, are reasonable, and should be applied 57
A. The Congressional policy of relieving small farmers marketing their fruit through cooperatives from the impact of employment taxes is abundantly clear and should be effectuated 57
B. The canon of liberal construction does not justify resistance to the intention of Congress to narrow coverage 61

Page
Conclusion 63
Appendix 64

AUTHORITIES CITED

Cases:

American Sugar Refining Co. v. *Louisiana,* 179 U. S. 89 ..... 57, 58, 59
American Sumatra Tobacco Corp. v. *Tone,* 127 Conn. 132, 15 Atl. (2) 80 27
Arkansas Cotton Growers Co-op. Assn. v. *Brown,* 179 Ark. 338, 16 S. W. (2) 177 41
Baiocchi v. *Ewing,* 87 F. Supp. 520 (N. D. Calif.) 8
Batt, In re, 66 Idaho 188, 157 P. (2) 547 58
Batt v. *Unemployment Compensation Div.,* 63 Idaho 572, 123 P. (2) 1004 ..... 26, 29, 58
Batt v. *United States,* 151 F. (2d) 949 (C.A. 9) 21, 23, 28, 29, 53
Better Business Bureau v. *United States,* 326 U. S. 279 61
Board v. *Hearst Publications,* 322 U. S. 111 52
Bogardus v. *Santa Ana Walnut Growers Assn.,* 41 Cal. App. (2) 939, 108 P. (2) 52 ..... 19, 43
Bowles v. *Inland Empire Dairy Association,* 53 F. Supp. 210 (E. D. Wash.) 43
Bowles v. *Seminole Rock & Sand Co.,* 325 U. S. 410 36
Bowles v. *Wheeler,* 152 F. (2d) 34 (C.A. 9) 36
Burger v. *Miller,* 66 F. Supp. 619 (S.D. Calif.), affd. 161 F. (2d) 992 (C.A. 9) 19, 41, 49, 55
Cache Valley Turkey Growers v. *Industrial Comm.,* 106 Utah 1, 144 P. (2) 537 ..... 26, 29
California Bean Growers Assn. v. *Williams,* 82 Cal. App. 434, 255 Pac. 751 41
California Employment Comm. v. *Bowden,* 52 Cal. App. (2) 841, 126 P. (2) 972 27
California Employment Comm. v. *Butte County Rice Growers Assn.,* 146 P. (2) 908, revd. 25 Cal. (2) 624, 154 P. (2) 892 29
California Employment Comm. v. *Kovacevich,* 27 Cal. (2) 546, 165 P. (2) 917 58
California & Hawaiian Sugar Refining Corp., Ltd. v. *Commr.,* 163 F. (2d) 531 (C.A. 9), cert. den. 332 U. S. 846 43
California Raisin Growers v. *Abbott,* 160 Cal. 601, 117 Pac. 767 41
Carmichael v. *Southern Coal & Coke Co.,* 301 U. S. 495 24
Carstens Packing Co. v. *Industrial Accident Board,* 63 Idaho 613, 123 P. (2) 1001 ..... 26, 29
City of Owensboro v. *Dark Tobacco Growers Assn.,* 222 Ky. 164, 300 S. W. 350 ..... 42, 43, 44
Claim of Lazarus, 268 A. D. 547, 52 N. Y. Supp. (2) 682, affd. 294 N. Y. 613, 64 N. E. (2) 169 ..... 46, 48
Colgate-Palmolive-Peet Co. v. *N. L. R. B.,* 338 U. S. 355 54
Comr. v. *South Texas Lumber Co.,* 333 U. S. 496 36
Cowiche Growers v. *Bates,* 10 Wash. (2) 585, 117 P. (2) 624, 26, 28, 29, 30
Damutz v. *Pinchbeck,* 158 F. (2) 882 (C.A.2) 61

Cases—Continued

Page

Detroit Bank v. *United States,* 317 U. S. 329 57
Dominion Hotel v. *Arizona,* 249 U. S. 265 57
Edinburg Citrus Assn. v. *N. L. R. B.,* 147 F. (2) 353 (C.A. 5) . 27
Emery-Bird-Thayer Dry Goods Co. v. *Williams,* 98 F. (2d) 166 (C.A. 8) 54
Employment Security Commission v. *Arizona Citrus Growers,* 61 Ariz. 96, 144 P. (2) 682 ..... 29, 33
Farmers Cooperative Co. v. *Birmingham,* 86 F. Supp. 201 (N. D. Iowa) 19, 43
Florida Fruit & Produce Co. v. *United States,* 117 F. (2d) 506 (C.A. 5) 57
Florida Ind. Comm. v. *Growers Equipment Co.,* 152 Fla. 595, 12 So. (2d) 889 ..... 27, 28
Fosgate Company v. *United States,* 125 F. (2d) 775 (C.A. 5), cert. den. 317 U. S. 639 ..... 24, 28, 33, 53, 58
Fox v. *Standard Oil Co.,* 294 U. S. 87 ..... 20, 54
H. Duys & Co. v. *Tone,* 125 Conn. 300, 5 Atl. (2) 23 24
Harrison v. *Northern Trust Co.,* 317 U. S. 476 ..... 17, 63
Henderson v. *Kimmel,* 47 F. Supp. 635 (D. Kan.) 61
Hendricks v. *DiGiorgio Fruit Corp.,* 49 F. Supp. 573 (N. D. Calif.) 33, 34
Idaho Potato Growers v. *N. L. R. B.,* 144 F. (2d) 295 (C.A. 9), cert. den. 323 U. S. 769 25
Industrial Commission v. *United Fruit Growers Assn.,* 106 Colo. 223, 103 P. (2) 15 29
Johnson v. *United States,* 163 Fed. 30 (C.A. 1) 57
Jones v. *Gaylord Guernsey Farms,* 128 F. (2d) 1008 (C.A. 10) 36
Kansas Wheat Growers' Assn. v. *Board of Commrs.,* 119 Kan. 877, 241 Pac. 466 43
L. *Gillarde Co.* v. *Martinelli,* 169 F. (2d) 60 (C.A. 1) 36
Lake Regional Packing Assn. v. *United States,* 146 F. (2d) 157 (C.A. 5) 28
Latimer v. *United States,* 52 F. Supp. 228 (S.D. Calif.), 24, 26, 27, 28, 29, 53, 58
Lazarus, In re, 294 N. Y. 613, 64 N. E. (2) 169, affg. 268 A.D. 547, 52 N.Y. Supp. (2) 682 ..... 20, 54
Liberty Warehouse Co. v. *Burley Tobacco Growers' Co-Op.,* 276 U. S. 71 58
McComb v. *Hunt Foods, Inc.,* 167 F. (2d) 905 (C.A. 9) 34, 62
Marketing Assn. v. *Manning,* 96 Colo. 186, 40 P. (2) 972 42
Michigan Unemployment Compensation Comm. v. *Unionville Milling Co.,* 313 Mich. 292, 21 N. W. (2) 135 ..... 20, 54, 55
Miller v. *Bettencourt,* 161 F. (2d) 995 (C.A. 9), 8, 10, 14, 18, 33, 41, 45, 49, 51, 56
Miller v. *Burger,* 161 F. (2d) 992 (C.A. 9), 8, 10, 14, 18, 19, 33, 41, 44, 45, 49, 51, 52, 56
Miller v. *Wilson,* 236 U. S. 373 58
National Broadcasting Co. v. *United States,* 319 U. S. 190, affg. 47 F. Supp. 940 (S.D. N.Y.) 7
New York Central v. *White,* 243 U. S. 188 58

Cases—Continued

Page

North Whittier Heights Citrus Assn. v. *N. L. R. B.,* 109 F. (2d) 76 (C.A. 9, cert. den. 310 U. S. 632, 9, 10, 20, 21, 25, 26, 49, 52, 53, 63
Norwegian Nitrogen Products Co. v. *United States,* 288 U. S. 294 36
O'Leary v. *Social Security Board,* 153 F. (2d) 704 (C.A. 3) 60
Pacific Coast Dairy v. *Dept. of Agriculture,* 318 U. S. 285 38
Punke v. *Murphy,* 267 App. Div. 673, 48 N.Y. Supp. (2) 347 37
Redlands Foothill Groves v. *Jacobs,* 30 F. Supp. 995 (S. D. Calif.) 25
Rhodes v. *Little Falls Dairy Co.,* 230 A.D. 571, 245 N.Y. Supp. 432, affd. 256 N.Y. 559, 177 N.E. 140 ..... 18, 43
Rottenberg v. *United States,* 137 F. (2d) 850 (C.A. 1), *affd. sub nom: Yakus* v. *United States,* 321 U. S. 414 61
San Joaquin Valley Poultry Prod. Assn. v. *Commr.,* 136 F. (2d) 382 (C.A. 9) 19, 43
Skidmore v. *Swift & Co.,* 323 U. S. 134 36
State ex rel. Beck v. *Kansas City,* 148 Kan. 623, 84 P. (2) 409, supp. 149 Kan. 252, 86 P. (2) 476 46
State of California v. *Fred S. Renauld & Co.,* 179 F. (2d) 605 (C.A. 9) 36
Steward Machine Co. v. *Davis,* 301 U. S. 548 57
Stuart v. *Kleck,* 129 F. (2d) 400 (C.A. 9) 25, 26
Swift & Co. v. *Bankers Trust Co.,* 280 N. Y. 135, 19 N. E. (2) 992 63
Taylor v. *Latimer,* 47 F. Supp. 236 (W.D. Mo.) 8
Texas Certified Cottonseed Breeders' Assn. v. *Aldridge,* 122 Tex. 464, 61 S. W. (2) 79 ..... 42, 43
Thompson v. *Social Security Board,* 154 F. (2d) 204 (App. D. C.) 7
Tigner v. *Texas,* 310 U. S. 141 ..... 24, 57, 58
Tobacco Growers' Co-Op. Assn. v. *Jones,* 185 N.C. 265, 117 S. E. 174 44
Tomlin v. *Petty,* 244 Ky. 542, 51 S. W. (2) 663 42
United States v. *American Trucking Assns., Inc.,* 310 U. S. 534 61
United States v. *Colfax Grain Growers, Inc.,* 157 F. (2d) 633 (C.A. 9) 14, 20, 21, 25, 34, 37, 57, 61, 62
United States v. *La Lone,* 152 F. (2d) 43 (C.A. 9) 7
United States v. *N. E. Rosenblum Truck Lines,* 315 U. S. 50 61
United States v. *Rock Royal Co-op.,* 307 U. S. 533 ..... 24, 32, 39, 40, 58
Van Beeck v. *Sabine Towing Co.,* 300 U. S. 342 57
Von Weise v. *Commr.,* 69 F. (2d) 439 (C.A. 8) 54
Waialua Agr. Co. v. *Maneja,* 178 F. (2d) 603 (C.A. 9) 25, 34, 52, 62
Walker v. *Altmeyer,* 137 F. (2d) 531 (C.A. 2) 7
Ward v. *Krimsky,* 259 U. S. 503 58
Watts v. *Railroad Retirement Board,* 56 F. Supp. 840 (E.D. La.), affd. 150 F. (2d) 113 (C.A. 5) 8
Wawa Dairy Farms v. *Wickard,* 149 F. (2d) 860 (C.A. 3) 8
Wenatchee Beebe Orchard Co., In re, 16 Wash. (2) 259, 133 P. (2) 283 ..... 27, 28
Western Union v. *Lenroot,* 323 U. S. 490 ..... 20, 59

Cases—Continued

Page

White v. *Winchester*, 315 U. S. 32 36
Wong Yang Sung v. *McGrath*, 70 S. Ct. 445 ..... 57, 60
Yakima Fruit Growers Assn., In re, 20 Wash. (2) 202, 146 P. (2) 800 28
Yakima Fruit Growers Assn. v. *Henneford*, 182 Wash. 437, 47 P. (2) 831 43

Statutes:

Social Security Act of 1935, 49 Stat. 620, *et seq.*:

Sec. 210 (b) (1), 49 Stat. 625 11
42 U.S.C. 1008, 49 Stat. 638 59
42 U.S.C. 1108, 49 Stat. 643 59
42 U.S.C. 1302, 49 Stat. 647 59

Social Security Act, as amended, Title II, 53 Stat. 1360, 1362:

Sec. 201, 42 U.S.C. 401, 53 Stat. 1362 3
Sec. 202 (c), 42 U.S.C. 402 (c), 53 Stat. 1364 3
Sec. 202 (e), 42 U.S.C. 402 (e), 53 Stat. 1365 3
Sec. 203 (d) (1), 42 U.S.C. 403 (d) (1), 53 Stat. 1367 60
Sec. 205 (a), 42 U.S.C. 405 (a), 53 Stat. 1368 59
Sec. 205 (g), 42 U.S.C. 405 (g), 53 Stat. 1370 ..... 1, 2, 7
Sec. 209(b), 42 U.S.C. 409(b), 53 Stat. 1374 ..... 3, 11
Sec. 209(c), 42 U.S.C. 409(c), 53 Stat. 1376 37
Sec. 209 (g), 42 U.S.C. 409 (g), 53 Stat. 1376 3
Sec. 209(h), 42 U.S.C. 409(h), 53 Stat. 1376 3
Sec. 209 (1) (4), 42 U.S.C. 409 (1) (4), 53 Stat. 1377, 2, 9, 12, 16, 21, 30, 36, 47, 52, 53, 60, 62

Chapter 9, Subchapter A, Internal Revenue Code, 26 U.S.C. Sec. 1426 (h) (4), 53 Stat. 1387 ..... 9, 14, 30
Chapter 9, Subchapter C, Internal Revenue Code, 26 U.S.C. 1607 (1) (4), 53 Stat. 1396 ..... 14, 30, 54
Federal Insurance Contributions Act and Unemployment Tax Act, 26 U.S.C. Secs. 1429, 1609, 53 Stat. 178, 183 59
Internal Revenue Code, 26 U.S.C. 101 (12) 44
Internal Revenue Code, 26 U.S.C. 1421 37
Judicial Code, 28 U.S.C. 1291 2
Capper-Volstead Act, Act of Feb. 18, 1922, 42 Stat. 388, 7 U.S.C. 291 32
Reorganization Plan No. 2 of 1946, Sec. 4, House Doc. No. 595, 79th Cong., 2d Sess., 11 F.R. 7873, 60 Stat. 1095, set out in note under Sec. 133y-16 of Title 5, U.S.C. 2
California Agricultural Code, Sec. 1192 42
California Agricultural Code, Sec. 1217, Chapter IV, Div. 6 ... 4

Regulations and Rules:

Social Security Administration Regulations No. 3 (Title 20, C.F.R. (1940 Supp.)), Part 403:

Sec. 403.808 (e) 12, 34

Regulations and Rules—Continued

Page

Treasury Regulation 106 (Applicable to Federal Insurance Contributions Act) (Title 26, C.F.R. (1940 Supp.)), Part 402:

Sec. 208 (e) (2), (3) 34

Treasury Regulation 107 (applicable to Unemployment Compensation Tax) (Title 26, C.F.R. (1940 Supp.)), Part 403:

Sec. 208 (e) (2), (3) 35

Federal Rules of Civil Procedure, Rule 56 7

Committee Reports:

H. Rep. No. 728, 76th Cong. 1st Sess., pp. 51, 52-53 .... 16, 31, 32, 45
H. Rep. No. 734, 76th Cong., 1st Sess., pp. 61, 63-64 .... 16, 31, 32, 45

Hearings relative to the Social Security Act Amendments of 1939 before Committee on Ways and Means, House of Representatives, 76th Cong., 1st Sess.:

p. 62 27
pp. 1349-1350 31
pp. 2028-2040 31
pp. 2040-2049 31

Debates on the 1939 Amendments:

84 Cong. Rec. 6864-6865 (Congressman Buck, June 8, 1939) ... 15, 30

Rulings:

Em. T—Coll. Mim. 6219, Dec. 31, 1947, as modified by Mim. 6239, Mar. 1, 1948, par. 6 33
Int. Rev. Bur. C. B. XV-2, p. 411, S.S.T. 10 28
Int. Rev. Bur. C. B. 1937-1, p. 394, S. S. T. 106 37

Bills:

H. R. 4018, 78th Cong., 2d Sess. 49
H. R. 4175, 78th Cong., 2d Sess. 49
H. R. 169, 80th Cong., 1st Sess. 49

Texts and Articles:

Blaehly and Oatman, Judicial Review of Benefactory Action, 33 Geo. L. J. 1, 12, fn. 53 60
Henderson, Gerard C., Cooperative Marketing Associations, 23 Col. L. Rev. 91, 102-103, 111 ..... 41, 44
Murray, Merrill G., Can We Insure Domestic and Farm Workers, 30 Am. Labor Legisl. Rev. 159 (Dec. 1940) 25
Sen. Doc. No. 95 (Report on Cooperative Marketing of Farm Products), pp. XLII-XLIII, 70th Cong., 1st Sess., Fed. Trade Commission, Cooperative Marketing, A Report on Development & Importance of the Cooperative Movement (1928) 44

In the United States Court of Appeals for the Ninth Circuit

No. —

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, APPELLANT

v.

MARY R. BAIOCCHI, APPELLEE

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT AND APPENDIX

JURISDICTIONAL STATEMENT

Plaintiff brought suit in the United States District Court for the Northern District of California, Southern Division, to review, pursuant to Section 205(g) of the Social Security Act as amended (42 U.S.C. Sec. 405(g), 53 Stat. 1360, 1370), a denial of a widow's current insurance benefits and child's insurance benefits. These benefits were denied on the ground that the wage-earner, Almando Baiocchi, was not entitled to additional wage credits and quarters of coverage because his services in processing fruits for a farmers' marketing cooperative after December 31, 1939, were in "agricultural labor" as defined by Congress in its August 10, 1939 amend-

ments to the Social Security Act, and as such were outside the coverage of the Social Security Act as amended.

The jurisdiction of this court to review the order of the district court is sustained by Section 205(g) of the Social Security Act as amended, and by 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California entered January 10, 1950, reversing the decision of the Federal Security Administrator [1] denying benefits, and directing that the Social Security Administration recompute the benefits applied for by including, as part of the deceased wage-earner Baiocchi's total statutory wage credits, payments made to him for fruit processing from January 1, 1940 through 1944.

The decision reversed by this order of January 10, 1950, was that Baiocchi's processing services in that period were in excluded "agricultural labor" as defined in Section 209(1)(4) of the Social Security Act as amended, 42 U.S.C. Sec. 409 (1)(4), 53 Stat. 1360, 1377, and therefore did not give rise to "wages" in determining his number of quarters of coverage and fully or currently insured status at the time of his death.

A. The Administrative Proceedings

Mary R. Baiocchi, the widow of Almando Baiocchi, applied to the Social Security Administration for sur-

---

[1] The administration of Title II of the Social Security Act was originally vested in the Social Security Board. By the President's Reorganization Plan No. 2, effective July 16, 1946 (Section 4, House Docket 595, 79th Congress, 2d Sess., 11 F. R. 7873, 60 Stat. 1095, set out in note under Section 133y-16 of Title 5, U. S. C.) it was abolished and its functions transferred to the Federal Security Administrator. The Social Security Administration is the operating branch of the Federal Security Agency which administers Title II of the Social Security Act. The Bureau of Old-Age and Survivors Insurance and the Office of the Appeals Council are constituent units of the Social Security Administration.

vivors insurance benefits, a widow's current insurance benefits for herself (42 U.S.C. 402(e)), and a child's insurance benefits for her minor children (42 U.S.C. 402(c)) under the provisions of Title II of the Social Security Act as amended (42 U.S.C. 401, *et seq.*). The right to Title II benefits depends on whether her deceased husband rendered services for wages of $50 or more in covered employment for the seventeen calendar quarters required under Section 209(g) of the Act (42 U.S.C. 409(g)) to qualify him as a "fully insured individual," or in six calendar quarters in the three years before his death on July 8, 1945, as required under Section 209(h) to qualify him as a "currently insured individual." If his services after December 31, 1939 in processing fruit for a farmers' marketing cooperative association were in *covered* employment, his insurance status qualified his survivors to benefits; if they were in *excepted* employment, he enjoyed no status as a fully or currently insured individual, and his survivors were not entitled to benefits.

Plaintiff's application for benefits was denied. On November 3, 1947, she requested reconsideration. She was accorded a hearing before a referee of the Federal Security Agency who denied her claim. Her request for a review by the Appeals Council was denied. She then instituted the action in the district court.

The undisputed facts brought out in the hearing before the referee may be summarized briefly as follows:

Baiocchi was employed by the California Prune and Apricot Growers Association, a farmers' marketing cooperative, from 1939 to November 4, 1944. He received wage credits for his services prior to January 1, 1940, the effective date of the 1939 amendment enlarging the definition of "agricultural labor" (see 42 U.S.C. 409(b)), and for maintenance work thereafter.

The California Prune and Apricot Growers Association is a nonprofit cooperative agricultural and horticultural association without capital stock, organized May 1, 1922 under Division 6, Chapter IV (Section 1217) of the California Agricultural Code. Its articles of incorporation provide (Article II (i)) that "All activities of this Association shall be non-profit and cooperative in character; and shall be limited to activities arising out of the financing of its members or the production, marketing, selling, harvesting, drying, processing, packing, canning, storing, and handling of the agricultural and horticultural products of its members only." Membership is limited (Article VI (c)) to any prune, apricot, or other fruit grower, or the landlord or tenant, or lessor or lessee of orchards on which prunes, apricots, or other fruits are grown, provided the landlord or lessor receives all or part of his rental in prunes, apricots, or other fruits. Representatives of local prune, apricot, or other fruit marketing associations may be admitted to it on the same terms.

The cooperative acts as a marketing instrumentality for local associations [2] through which individual grower members handle their produce. It deals mainly in dried prunes which it receives in a dried state. Its system of operations was as follows:

Each grower enters into a marketing agreement with a local and each local enters into an agreement with the California Prune and Apricot Growers Association. The local agrees to purchase from the grower all the prunes or other fruit he produces and the Association

---

[2] The members of the California Prune and Apricot Growers Association, the locals, are associations organized under the same chapter of the California Agricultural Code. Each of the constituent local associations has its own constitution and by-laws which, so far as here material, do not differ substantially from each other. The articles of the Glenn County Prune and Apricot Growers, Inc., a typical local, are in the record. They state that

agrees to buy them from the local. The grower dries the prunes and delivers them to a packing house, receiving plant, or grading point designated by the local or the Association. There they are weighed, graded, and classified by standards prescribed by the Association and then are pooled and put in storage until the Association receives an order for certain types. They are then processed, packed, and shipped. Only fruit produced by members is handled.

The Association agrees to sell the prunes at such prices and times as it deems best for the locals, to whom the proceeds are distributed in the proportion the value of the products to be marketed for each bears to the total, less expenses of marketing. The local pays growers on a similar basis. The amounts payable to growers are undetermined until the seasonal crop is sold by the Association, when the proceeds are distributed. The "demand and trade custom" at the present time is that the prunes be graded for quality and size, sterilized, and put into consumer packages before being marketed. These are the services performed by the Association, and by the decedent for the Association.

The referee described the marketing arrangement the farmer has with the Association in the following terms:

> "The grower brings his prunes to one of the packing houses operated by the Association and upon delivery and inspection thereof by the Association is given a receipt for such delivery. At the time the receipt is given, the fruit is received and

---

it is a nonprofit cooperative agricultural association without capital stock, and specifically authorize it to federate with other nonprofit cooperative agricultural associations organized and operated for substantially the same purposes and to become a member of the California Prune and Apricot Growers Association as central sales agency. Its purposes and membership are limited like those of the central agency itself.

the matter is reported to the accounting office of the Association, and the grower is paid an 'advance payment' which is 65% of the field price which prunes are then bringing. Thereafter and until the seasonal pack is totally sold, progress accountings and payments are made, and, at the time the entire seasonal pack is sold, the grower is given a final accounting and payment for prunes delivered to the Association in that season. The prunes, upon receipt are co-mingled with all other prunes in the packing house and are shipped as orders are received. Consequently, the prunes may remain in the packing house anywhere from two months to eighteen months, depending on the size of the pack and the condition of the prune market. So, it appears that in some instances a grower may wait as long as eighteen months for his final payment and accounting. After the prunes are delivered by the grower to the Association, he loses all control over them physically and under the contract he has with the local association, of which he is a member, he parts with sufficient title in those prunes to the Association to allow the Association to handle those prunes as outright owner. In this regard, the Association is empowered to borrow money, giving the prune pack in its possession as security therefor and do all of the things necessary or proper that any person, who is the outright owner of produce, might do with such prunes. However, it appears from the manner in which the title is handled that the grower continues carrying economic risk, as it cannot be determined what he will receive for his crop until the entire seasonal crop of all member growers is sold in full. In this regard, the transfer of the prunes from the grower to the Association differs from the transfer of produce from a grower to a commercial packer who purchases the produce outright at a market price, or any other price agreed upon between the grower and the commercial packer."

The referee found that the services rendered by the wage-earner since January 1, 1940, as a dried fruit

processor, excluding services rendered as a maintenance man, for the California Prune and Apricot Growers Association, a cooperative association, were within the exception and not the coverage. He, therefore, concluded that claimant was not entitled to the benefits for which she applied. When, on June 29, 1948, the Appeals Council denied a request for review, this became the final decision of the Federal Security Administrator.

B. The Proceedings in the District Court

Thereafter, plaintiff commenced this action under Section 205(g) of the Act as amended (42 U. S. C. 405(g), 53 Stat. 1360, 1370) to review and set aside the administrative decision. The Federal Security Administrator answered the complaint and in accordance with the requirements of Section 205(g) filed as part of his answer a certified transcript of the administrative record.

Section 205(g) of the Act as amended does not contemplate a trial *de novo*. It provides that the reviewing court "shall have power to enter upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator."

In view of the limited nature of judicial review in proceedings authorized by Section 205(g) and the fact that the record before the court consists only of the pleadings, including the administrative transcript, it has been the practice to present the issue on motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure after the answer has been filed and served. *Walker* v. *Altmeyer,* 137 F. (2d) 531 (C. A. 2); *United States* v. *La Lone,* 152 F. (2d) 43 (C. A. 9); *Thompson* v. *Social Security Board,* 154 F. (2d) 204 (App. D. C.); *cf. National Broadcast-*

ing Co. v. *United States,* 319 U. S. 190, 227, affirming 47 F. Supp. 940, 946-947 (S. D. N. Y.); *Wawa Dairy Farms* v. *Wickard,* 149 F. (2d) 860, 864 (C. A. 3); *Watts* v. *Railroad Retirement Board,* 56 F. Supp. 840 (E. D. La.), affirmed 150 F. (2d) 113 (C. A. 5); *Taylor* v. *Latimer,* 47 F. Supp. 236 (W. D. Mo.). Plaintiff moved for summary judgment in this case. No new evidence was taken.

C. The Decision of the District Court

In the district court, Judge Harris wrote an extensive opinion of reversal (reported in 87 F. Supp. 520) on the plaintiff's motion for summary judgment, in which he held that the services were not excepted "agricultural labor." He held that the association's "operations are identical with those of the Rosenberg Brothers Corporation" (the commercial handler involved in *Miller* v. *Burger,* 161 F. (2d) 992, decided by this court); that "When Locals turn dried fruit over to the Central Sales Agency the fruit is in a merchantable state"; when delivered by the locals, "Payment of the purchase price is postponed, but *it is fixed* and the Central Sales Agency is subject to account to the Locals according to contract, by-laws and statute"; that "decedent worked for a terminal market for distribution for consumption after the dried fruit had reached the grocer's (*sic*) or terminal market". The court accepted the contentions that it was "axiomatic that the Court should be liberal in its interpretation," that the court was free to make its own determination of the scope of the statute, and that this court in *Miller* v. *Burger,* 161 F. (2d) 992, and *Miller* v. *Bettencourt,* 161 F. (2d) 995, in considering work performed in employment "identical" with that of Baiocchi, had ruled the plant was a terminal market and that the services were performed after all agricultural labor in connec-

tion with such dried fruit had ceased. Any distinction predicated on the cooperative status of the employer here was unsound, by virtue of *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76 (C. A. 9). The Act itself, the lower court stated, makes no distinction. Nor did the association come within the rationale of the exclusion, "the solicitude of Congress for the small farmer who is ill-equipped to maintain complex records on laborers who are hired on a strictly seasonal basis."

The court accordingly found that the wage-earner was in covered employment and that plaintiff was entitled to the benefits claimed.

The defendant appealed on February 14, 1950.

SPECIFICATION OF ERRORS RELIED UPON

The district court erred:

1. In failing to hold that the services were properly considered to be "agricultural labor" as defined in Section 209(1)(4) of the Social Security Act as amended (42 U. S. C. 409(1)(4)) and in the corresponding tax statute, Chapter 9 (A) of the Internal Revenue Code, 26 U. S. C. 1426(h)(4).

2. In holding that the California Prune and Apricot Growers Association was a terminal market for distribution for consumption.

3. In holding that the deceased wage-earner's work was performed after the dried fruit had reached (a) the grower's market or (b) the terminal market.

4. In holding that the court was free to make its own determination of the scope of the statute without proper regard for the practice evolved by the Federal Security Agency and the Bureau of Internal Revenue in coordinating the administration of the tax and benefit provisions, which had a reasonable basis in law.

5. In concluding that the decisions of this court in *Miller* v. *Burger,* 161 F. (2d) 992, and *Miller* v. *Bettencourt,* 161 F. (2d) 995, dealing with the workers of a commercial handler purchasing fruit outright, are controlling with respect to the coverage of workers of a nonprofit farmers' cooperative organized for the sole purpose of marketing their crop.

6. In substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and the corresponding tax provisions.

7. In substituting the views of this court in *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, for the statutory definition adopted by Congress for Title II of the Social Security Act.

8. In disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when locals turn dried fruit over to California Prune and Apricot Growers Association (1) it is in a merchantable state and (2) payment of the purchase price is then fixed, although postponed.

9. In holding that the Social Security Act makes no distinction between nonprofit farmers' cooperatives and commercial handlers, and thereby (a) nullifying the exception of services such as grading, processing, and packing, incident to the preparation of fruits and vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due the expertness of the Federal Security Agency, and (b) invalidating the regulations promulgated by the Social Security Administration.

10. In not holding that the farmer's economic concern over the return on his fruit is not at an end when his fruit reaches the cooperative and that he has not "parted with economic interest in its future form or destiny."

11. In not holding that the California Prune and Apricot Growers Association was an agent rather than a buyer or middleman, and that services for the Association were for the account of the growers.

12. In permitting the coverage of Title II of the Social Security Act and its artificial, statutory definition of "agricultural labor" to be extended by voluntary contributions of the California Prune and Apricot Growers Association.

13. In mistakenly assuming that the basic reason for excluding processing workers from coverage under the 1939 amendment to the Social Security Act was the difficulty the small farmer has in keeping records, and not the desire to relieve the smaller farmer from the impact and incidence of taxes imposed on fruit and vegetable processing which might be passed back to him, although large growers doing their own processing would not be subject to employment taxation.

14. In granting plaintiff's motion for summary judgment, and in reversing and remanding the cause.

STATUTES AND REGULATIONS INVOLVED

For the convenience of the court, the statutes and regulations herein involved are assembled in an appendix hereto (pp. 64-68, *infra*).

Prior to 1940, Title II of the Social Security Act excepted "agricultural labor" from employment without defining it. Section 210(b)(1) of the Act of August 14, 1935, 49 Stat. 625. Effective January 1, 1940 (42 U. S. C. 409(b)), agricultural labor was given a statu-

tory definition in Section 209(1) of the Act as amended (42 U. S. C. 409(1), 53 Stat. 1377) which provides in pertinent part as follows, for the period beginning January 1, 1940:

> "(1) The term 'agricultural labor' includes all service performed—
>
> "(4) *In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity;* but only if such service is performed as an incident to ordinary farming operations or, *in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market.* The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." (Italics supplied).

Social Security Administration Regulations 3, Part 403, Title 20, C.F.R., Section 403.803 (e) provides as follows:

> "(e) Services described in Section 209(1)(4) of the Act:
>
> "(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, processing, freezing, grading, storing, or delivering to storage or to market, of any agricultural or horticultural commodity, other than fruits and vegetables (see subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

"Generally services are performed 'as an incident to ordinary farming operations' within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed 'as an incident to ordinary farming operations'.

"(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

"(3) The services described in subparagraphs (1) and (2) above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for consumption."

QUESTIONS PRESENTED

1. Under the frame of reference of the 1939 amendments to the Social Security Act, are the workers of a farmers' marketing cooperative engaged in processing fruit in covered employment?

2. Is the question of coverage controlled by *Miller* v. *Burger,* 161 F. (2d) 992 (C.A. 9) and *Miller* v. *Bettencourt,* 161 F. (2d) 995 (C.A. 9), dealing with the processing employees of one of the world's largest commercial handlers, which purchased its fruit outright?

3. Will the decision below stand with *United States* v. *Colfax Grain Growers, Inc.,* 157 F. (2) 633 (C.A. 9)?

4. Was the court warranted in preferring previous judicial insights as to the category into which cooperatives fit to the statutory definition and the explicit economic objectives that Congress provided should govern the administration of Title II of the Social Security Act and Subchapters A and C of Chapter 9 of the Internal Revenue Code, and in subordinating the statutory definition to decisional analogies?

5. May a farmers' marketing cooperative validly be classified as a terminal market or a grower's market in any sense—real, statutory, or economic?

6. Did the district court give appropriate weight to the policy of Congress, to the determination of the expert body entrusted with the administration of Title II of the Social Security Act, and to the uniform regulations of the Social Security Administration and the Bureau of Internal Revenue?

7. Was the district court warranted in focusing on the benefit aspect of the problem and ignoring the correlative tax aspect?

In the fruit industry particularly, the individual farmer's serious marketing difficulties and disadvantages and the increasing cost of mechanical equipment required to process and pack for market forced most growers into cooperatives or into dealings with commercial handlers. Under the 1935 Act, employment taxes were imposed on processing of fruit crops marketed through associations but not on crops marketed by large ranchers able to carry out their own integrated operations. The alleged unfairness and inequity of taxing the portion of the fruit crop distributed through cooperatives while exempting fruit marketed by large growers were vigorously portrayed. The aim was to eliminate the tax advantage, not by subjecting the large grower to new taxes but by relieving the small farmer from the burden of taxes reducing his return from farming operations. Congressman Buck espoused the cause, contending that the definition of "agricultural labor" applied by the Social Security Board and the Bureau of Internal Revenue inequitably discriminated against the members of cooperatives in favor of large growers financially capable of conducting a "complete agricultural operation from producing a crop to delivering for transportation to market." In his words, his amendment was designed to make it plain that "what is agricultural labor is determined by the *nature of the work* and not by whom the man is employed. Agricultural labor starts with planting a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be disregarded as in the nature of agricultural labor." 84 Cong. Rec. 6864, 6865 (June 8, 1939). The effect on the coverage of a cooperative's employees and others engaged in preparing fruits and vegetables for market received no specific mention.

Manifestly, they would be denied the coverage and benefits that would be available to industrial workers and others not within any exception to coverage.

The purpose of the 1939 agricultural labor exception as modified was authoritatively explained in the Committee Reports (H. Rep. No. 728, 76th Cong., 1st Sess., p. 51; S. Rep. No. 734, 76th Cong., 1st Sess., p. 61):

> "The present law exempts 'agricultural labor' without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected.
>
> "Your committee believes that greater exactness should be given to the exception and that it should be broadened to include as 'agricultural labor' certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones."

The Reports proceed to explain Section 209(1)(4) as follows (H. Rep. No. 728, 76th Cong., 1st Sess., pp. 52-53; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 63-64):

> "Paragraph (4) of the subsection extends the exemption to services (though not performed in the employ of the owner or tenant or other operator of a farm) performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity, provided such service is performed as an incident to ordinary farming operation, or in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. . . . The expression 'as an incident to ordinary farming opera-

tions' is in general intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization, or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. . . .

"In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute 'agricultural labor' even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or sorting of ["citrus" appears at this point in H. Rep. No. 728, but not in S. Rep. No. 734] fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities."

SUMMARY OF ARGUMENT

It is incumbent on the courts, as on administrative agencies, to be responsive to changed policies reflected in Congressional legislation and to carry them out even when they are inconsistent with rules evolved by the courts before Congress took over in areas once left open for interpretation. *Harrison* v. *Northern Trust Co.,* 317 U.S. 476.

Prior to January 1, 1940, the effective date of the 1939 amendments, processing services were not within the exception for "agricultural labor" unless they were in the employ of the owner or tenant of the farm, under the Social Security Board's regulations. The 1935 Act merely excepted "agricultural labor." It left the

term undefined. The 1939 amendments were imbued with a new purpose, to improve the disadvantageous competitive position of the small grower (who, with insufficient volume and financing to process his fruit, had to absorb the cost of social security taxes on the processing operations) in relation to the large rancher who, in processing his own fruit, was relieved of social security taxes. It is unimportant whether the assumptions as to tax incidence are sound or even tenable, as long as Congress has signified its intention that cooperative marketing associations be relieved from employment taxes tending to reduce the small farmer's return from his operations. Congress endorsed the theory that a cooperative's separate existence does not detract from the substantial identity of its economic interest with that of its members. If, in trying to be practical, it failed to protect packing house workers as in the 1935 Act, the remedy is by corrective legislation.

That a farmers' marketing cooperative is neither a terminal market nor a "grower's market," permits of no doubt. Certainly Congress was not in doubt. Before the cooperative has disposed of the fruit, the grower's return is undetermined and unascertainable. Unlike the *Burger* and *Bettencourt* cases, where the processing was performed for one of the world's largest commercial handlers, which purchased its fruit outright, the services here were for a farmers' marketing cooperative that functions exclusively as a marketing agency for its grower members. Their direct concern over the return on the fruit is not at an end when the cooperative takes it in hand; until the cooperative has sold their fruit, their return is subject to all the vagaries of the market. Even though title may have passed *for convenience in marketing,* still the arrangement is for cooperative marketing. *Rhodes* v. *Little Falls Dairy Co.,* 230 A.D. 571, 245 N.Y. Supp. 432, 434, affirmed 256

N.Y. 559, 177 N.E. 140. Until the cooperative has sold the fruit, the grower has not parted "with economic interest in its future form or destiny." *Burger* v. *Miller,* 66 F. Supp. 619, 626 (S.D. Calif.), affirmed 161 F. (2d) 992 (C.A. 9). This court agreed that the commercial handler was a market only because the grower had parted with his economic interest in the fruit, its future form or destiny. It would have disagreed if the grower retained such interest. The referee's factual summary opinion is an explicit refutation of the contention that the cooperative functions as a market. See pages 5-6, *supra.* Even under a so-called "sales" contract, the cooperative needs and acquires no greater title than is necessary to accomplish its purpose, to obtain the power to give a full and unencumbered title for convenience in financing and in marketing operations. *San Joaquin Valley Poultry Prod. Assn.* v. *Commissioner,* 136 F. (2d) 382 (C.A. 9); *Bogardus* v. *Santa Ana Walnut Growers Assn.,* 41 Cal. App. (2) 939, 108 P. (2) 52; *Farmers Cooperative Co.* v. *Birmingham,* 86 F. Supp. 201, 215-216 (N.D. Iowa). It is an "agent" rather than a "buyer" in any real sense. Regardless of whether it operates under a "sales" or an agency contract, its activities are functionally integrated with farming activities in the sense of the Congress. Services for the Association were for the account of the grower within this court's *Burger* test, and were an incident to preparation for market within the statutory contemplation.

The interpretation of "market" and "terminal market" made by the court below stultifies the purpose of Congress by confining the exception to services already excepted under the 1935 Act despite the fact that even in determining what was an incident to ordinary farming operations Congress included services commonly performed by cooperatives. *United States*

v. *Colfax Grain Growers,* 157 F. (2d) 633 (C.A. 9). Fruit and vegetable growers were intended to be given even more preferential treatment by the exception of services incident to preparation for market. In taking as its standard for determining whether services come within the exception the form and condition in which fruit is customarily sold or disposed of by the ordinary grower, and shutting off cooperative activity by converting a cooperative into a market, the court excluded from the promised relief the very farmers intended to benefit from the expansion of agricultural labor.

Admittedly, exclusion from statutory "wages" of compensation for services rendered in a city, off the farms where the crop was harvested, on the ground that they were in agricultural labor, is anomalous. However, while the operations were performed under industrial conditions similar to those in the plant of a commercial handler, the work performed for a commercial handler is not in employment "identical" with Baiocchi's: his services were for a farmers' marketing cooperative which did not purchase outright. *In re Lazarus,* 294 N. Y. 613, 64 N.E. (2) 169, affirming 268 A.D. 547, 52 N.Y. Supp. (2) 682; *Michigan Unemployment Compensation Comm.* v. *Unionville Milling Co.,* 313 Mich. 292, 21 N.W. (2) 135. To attribute the agricultural labor *amendment* to the small farmers' difficulties in reporting on seasonal workers is unsupportable.

The statutory definition of "agricultural labor" is obviously artificial (*Fox* v. *Standard Oil Co.,* 294 U. S. 87, 95; *Western Union* v. *Lenroot,* 323 U. S. 490, 502) and may not be restricted in the light of the courts' own commonsensible views or their definitions of the term prior to specific legislation which in large measure was a reaction thereto. This court was free to construe "agricultural laborer" in *North Whittier*

Heights Citrus Assn. v. *N. L. R. B.,* 109 F. (2d) 76 (C.A. 9), cert. den. 310 U. S. 632, as used in the Wagner Act. However, in the 1939 amendment to the Social Security Act, Congress specifically addressed itself to the matter and provided that for all agricultural commodities processing ordinarily performed by a farmers' cooperative was agricultural labor, and that for fruits and vegetables, the activity need only be an incident to preparation for market, even though not performed as an incident to ordinary farming operations, to be excepted. The amendment speaks clearly and unambiguously in terms of contraction of coverage.

The issue may not be disposed of simply by recourse to a rule of liberal construction, which in any event is only an auxiliary aid to the construction of statutes of doubtful meaning or applicability. *United States* v. *Colfax Grain Growers,* 157 F. (2d) 633, 636 (C.A. 9). The legislative history inhibits invocation of such a rule and demonstrates that the tax burden on the small farmer and not reporting difficulties was the reason for the broadened exception. The principle of liberal construction is inapplicable, for in Section 209(1)(4) the special solicitude of Congress for small farmers prevailed over the normal preference for coverage. Plainly Congress contracted coverage and did not transplant the *North Whittier* (109 F. (2d) 76) approach to cooperatives as the "true test" for determining whether the work has "an industrial hue." *Batt* v. *United States,* 151 F. (2) 949, 950 (C.A. 9).

ARGUMENT

POINT I

SERVICES AFTER DECEMBER 31, 1939, PROCESSING FRUIT IN THE EMPLOY OF A FARMERS' MARKETING COOPERATIVE ARE WITHIN THE SCOPE AND PURPOSE OF THE BROADENED AGRICULTURAL LABOR EXCEPTION

A. The Legislative History of the Congressional Definition Supports the Exception of the Services in Question

The Social Security Act as amended, in its application to agricultural labor, is the culmination of a course of developments which simplifies the task of interpretation through reconstruction of legislative intention and demonstrates that the decision of the referee not only had reasonable basis in law but was inevitable.

Where the 1935 Act merely excepted "agricultural labor" without affording further guidance, the 1939 amendments broadened the exception in response to representations that leave no doubt that the previous criteria for deciding whether services were in agricultural labor were rejected and superseded by new criteria to narrow coverage. Previously it may have been justifiable to limit the exception to situations where reporting difficulties on the part of small farmers and administrative inconvenience were major obstacles to coverage and effective tax collection; the degree of industrialization, the specialization of the services, and the location and size of the establishment may have been pertinent in deciding whether particular services came within the presumed purpose of the exception. The 1939 amendments, however, took a new tack and left relatively little room for construction. Disavowing prospectively the old standards, they were infused with the conviction, right or wrong, that cooperative processing and marketing were each "an integral part of farming activities," that the farmer bore the brunt

of employment taxes imposed on marketing cooperatives and was unable to pass on such added costs of production to the consumer, and that relief from the impact of unemployment taxes and taxes for the support of the old age and survivors insurance program was necessary to remove a serious competitive disadvantage from the small farmer. The large farmer, it was assumed, would remain exempt from social security taxes on processing performed on his own farm on his own fruit and vegetables. On the other hand, the small farmer, to complete his operation, would have to have these services performed for him by a cooperative, which should be given the same exemption, else, it was postulated, the taxes imposed on the processor would be shifted back to him. The decision of the court below gave less than full play or hospitable scope to the major purpose of the 1939 amendment, to make certain that the small grower's fruits and vegetables would reach the market, where his effective prices were fixed, as free from social security taxes as the large ranch owner's.

The 1935 Social Security Act excepted "agricultural labor" from covered employment without enlarging. Admittedly, the words were general and might not embrace activities no longer customarily performed by individual growers, activities which in the evolution of farming had been taken over by larger aggregations, such as cooperatives, able to afford the outlay for plant, equipment, and specialized services. See *Batt* v. *United States*, 151 F. (2d) 949 (C.A. 9). As interpreted in the regulations issued by the Social Security Board, and by the Bureau of Internal Revenue (with the approval of the Secretary of the Treasury) in connection with collecting social security contributions, "agricultural labor" encompassed services performed in the processing, packaging, and marketing of agricultural

products only when they were performed by an employee of the producer and as "an incident to ordinary farming operations, as distinguished from manufacturing or commercial operations." This interpretation, as the Fifth Circuit observed, was "not so broad, perhaps as the dictionary might have permitted, but it dealt practically and reasonably with some of the borderline questions. . . ." *Fosgate Company* v. *United States,* 125 F. (2d) 775, 777 (C.A. 5). Disregarding the overlap between farming and industry, manufacturing and commerce, by testing services performed in processing, packing, and marketing agricultural commodities by the nature of the enterprise for which the services were performed and by requiring that they be performed for the producer, the agencies excluded employment which might perhaps have come within the term "agricultural labor" from its scope under the 1935 Act.

Due to the absence of standards, the likelihood, or expectation, that the exception for agricultural labor would itself be short-lived, and the acknowledged need of many "fringe" workers for social insurance protection, the Social Security Board was able to choose among the rival tests one attuned to the principal apparent reason for the exception from the old age insurance and unemployment compensation systems. The foremost reason was the administrative difficulty in ascertaining farm wages and collecting taxes on farm work. *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495, 512-513; *Latimer* v. *United States,* 52 F. Supp. 228, 231 (S.D. Calif.); *H. Duys & Co.* v. *Tone,* 125 Conn. 300, 5 Atl. (2) 23, 25.[3] The Board was then

[3] Although administrative difficulties were assigned in the *Carmichael* case as a sufficient constitutional basis for the exclusion of agricultural works, other bases might have influenced the legislative exclusion. For example, growers might have been put in a favored class, as they were by the 1939 amendments. *Cf. Tigner* v. *Texas,* 310 U. S. 141; *United States* v. *Rock Royal Cooperative,*

free to search for a "common denominator," for lack of more tangible evidence of Congressional intention. Clearly it could not adopt as its test the *need* for the benefits of the social legislation (see Merrill G. Murray, *Can We Insure Domestic and Farm Workers,* 30 Am. Labor Legisl. Rev. 159 (Dec. 1940)) as the "common denominator of exclusion" (*cf. North Whittier Heights Citrus Assn.* v. *N. L. R. B.,* 109 F. (2d) 76 (C.A. 9), cert. den. 310 U.S. 632) for the need would not depend on the size of the farm and the validity of an administrative test that would exclude large farming operations and look only to the identity of the employer would be questionable. *Stuart* v. *Kleck,* 129 F. (2d) 400. Obviously, administrative difficulties were absent in enterprises predominantly commercial in nature, whose workers were paid in cash, as in comparable plants dissociated from farm produce and located in urban areas. The Board's concept of agricultural labor under the 1935 Act was, therefore, well adapted to restrict the applicability of the exception to those types of operations where administrative difficulties might be met.

The Board might have adopted a test of agricultural labor emphasizing the need for the Act's benefits (*cf. North Whittier Heights Citrus Assn.* v. *N. L. R. B.,* 109 F. (2d) 76, 79 (C.A. 9), cert. den. 310 U.S. 632) or it might have drawn the line at specialized services, as this court did in *Idaho Potato Growers* v. *N. L. R. B.,* 144 F. (2d) 295, 301 (C.A. 9), cert. den. 323 U.S. 769, where, in resolving a similar question under the parallel exception of agricultural laborers in the National Labor Relations Act, it stated:

> "In determining whether or not the employees in the case are agricultural laborers, we must make

---

307 U.S. 533, 563, *et seq; United States* v. *Colfax Grain Growers, Inc.,* 157 F. (2d) 633; *Waialua Agr. Co.* v. *Maneja,* 178 F. (2d) 603, 609 (C.A. 9); *Redlands Foothill Groves* v. *Jacobs,* 30 F. Supp. 995, 1004 (S.D. Calif.).

> a sharp cleavage in the basis of our reasoning. We must determine that all persons who perform labor, which is sometimes done, and which some years ago was habitually done, by the farmer, are agricultural laborers; or we must consider the purposes of the Wagner Act and hold that employees who are not working at farming, but who are specializing in the preparation of farm products for trade or shipment after they have been reaped or gathered, are not agricultural laborers. In the cases of *North Whittier Heights Citrus Ass'n.* v. *N. L. R. B.,* 9 Cir., 109 F. (2d) 76, and *N. L. R. B.* v. *Tovrea Packing Co.,* 9 Cir, 111 F. (2d) 626, we took the latter line of reasoning. . . ."

Thus this court, like the Board in its regulations interpreting the 1935 Act, repudiated a literally possible test of agricultural labor which was regarded as inimical to the *general* purposes of the Act under consideration, in default of a more specific purpose. Its language, however, reveals awareness of other tests of agricultural labor yielding different results. ". . . generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent." *North Whittier Heights Citrus Assn.* v. *N. L. R. B.,* 109 F. (2d) 76, 79 (C.A. 9). Where the services were performed on the farm, the nature of the services rendered, rather than the character of the employer, has been made the test, in deference to the inherent force of the term "agricultural labor." *Stuart* v. *Kleck,* 129 F. (2d) 400 (C.A. 9); *Latimer* v. *United States,* 52 F. Supp. 228, 234 (S.D. Calif.). The character-of-the-services test is one which is supported by authority. *Carstens Packing Co.* v. *Industrial Accident Board,* 63 Idaho 613, 123 P. (2) 1001; *Batt* v. *Unemployment Compensation Division,* 63 Idaho 572, 123 P. (2) 1004; *cf. Cache Valley Turkey Growers* v. *Industrial Comm.,* 106 Utah 1, 144 P. (2) 537; dissenting opinion in *Cowiche Growers* v. *Bates,*

10 Wash. (2) 585, 117 P. (2) 624, 635. That test might have been adopted by the Social Security Board. By rejecting it the Board made it possible for identical services to be excepted agricultural labor or covered employment, depending on the business of the employer. As Arthur J. Altmeyer, Chairman of the Board, said in urging a clarification of the law when the 1939 amendments were under consideration (Hearings relative to the Social Security Act Amendments of 1939 before the Committee of Ways and Means, House of Representatives, 76th Cong., 1st Sess., p. 62, hereafter referred to as "Hearings"):

> "Under the present law, a field worker of a large-scale vegetable-growing or marketing concern, may or may not be engaged in agricultural labor, depending on such factors as whether or not his employer was the grower or merely the purchaser of the crop. Likewise a worker employed in a processing operation may or may not be employed in agricultural labor, depending on whether the operation is sufficiently large and of such a character as to constitute conditions for the individual similar to industrial employment."

But no case has been found under the 1935 Act or similar legislation in which the mere size of an employer processing his own crops and the attendant specialization have prevented the exception for agricultural labor from being given effect. *Cf. Latimer* v. *United States,* 52 F. Supp. 228 (S. D. Calif.); *Edinburg Citrus Assn.* v. *N. L. R. B.,* 147 F. (2d) 353, 354 (C.A. 5); *In re Wenatchee Beebe Orchard Co.,* 16 Wash. (2) 259, 133 P. (2) 283; *Florida Ind. Comm.* v. *Growers Equipment Co.,* 152 Fla. 595, 12 So. (2) 889, 894-896; *American Sumatra Tobacco Corp.* v. *Tone,* 127 Conn. 132, 15 Atl. (2) 80. In *California Employment Comm.* v. *Bowden,* 52 Cal. App. (2) 841, 126 P. (2) 972, the court held that even if administra-

tive difficulties influenced the legislation, once the exception had been made, it could not be restricted to those classes of labor which would be seriously affected by those difficulties—that would confine the exception within limits unwarranted by the words themselves.[4]

In consequence of the regulations adopted by the federal agencies (which were followed by state unemployment compensation agencies) making the exception hinge on the character of the employer, the imposition of taxes on similar processing operations depended on the nature of the enterprise for which they were performed. Hence a grower was free from tax on the labor employed in packing his own fruit, although a farmers' cooperative and a commercial packer were not. *Batt* v. *United States,* 151 F. (2d) 949 (C.A. 9); *Latimer* v. *United States,* 52 F. Supp. 228, 235 (S.D., Calif.); *Fosgate* v. *United States,* 125 F. (2d) 775 (C.A. 5); *Lake Regional Packing Assn.* v. *United States,* 146 F. (2d) 157 (C.A. 5); *Internal Revenue Bureau Cumulative Bulletin XV-2,* p. 411, S.S.T. 10; *Florida Ind. Comm.* v. *Growers Equipment Co.,* 152 Fla. 595, 12 So. (2) 889. A fruit grower in Washington handling his own fruit paid no taxes (*In re Wenatchee Beebe Orchard Co.,* 16 Wash. (2) 259, 133 P. (2) 283) whereas a cooperative association of growers and a commercial handler whose help performed the same services were liable. *Cowiche Growers* v. *Bates,* 10 Wash. (2) 585, 117 P. (2) 624; *In re Yakima Fruit Growers Assn.,* 20 Wash. (2) 202, 146 P. (2) 800. On the liability of cooperatives, the decisions were conflicting—two states followed the federal rule and subjected farmers' marketing cooperatives to the same taxes as

---

[4] As we point out *infra,* pp. 30-31, it was on the assumption that services in processing crops for a large farmer were and should be excepted that Congress broadened the exception in 1939 so as to restore and equalize the competitive position of the small farmer.

were imposed on commercial handlers (*Employment Security Commission* v. *Arizona Citrus Growers,* 61 Ariz. 96, 144 P. (2) 682; *Cowiche Growers* v. *Bates,* 10 Wash. (2) 585, 117 P. (2) 624) and two states reached the conclusion that no taxes were payable on the ground that the cooperatives were merely instrumentalities of the growers and tenants of the farm (*California Employment Commission* v. *Butte County Rice Growers Assn.,* 146 P. (2) 908, 914; *Industrial Commission* v. *United Fruit Growers Association,* 106 Colo. 223, 103 P. (2) 15, 17; *cf. Cache Valley Turkey Growers* v. *Industrial Commission,* 106 Utah 1, 144 P. (2) 537). On reconsideration, however, the California Supreme Court held the services were in covered employment in the *Butte County* case, 25 Calif. (2) 624, 154 P. (2) 892. In Idaho, the court adhered to the test of the character of the services rendered. *Carstens Packing Co.* v. *Industrial Accident Board,* 63 Idaho 613, 123 P. (2) 1001; *Batt* v. *Unemployment Compensation Division,* 63 Idaho 572, 123 P. (2) 1004. But *cf. Batt* v. *United States,* 151 F. (2d) 949 (C.A. 9).

This very tax on cooperatives was the "mischief" that supplied the impetus for the 1939 amendments. The difference between the tax burden on the marketing of the produce of growers doing their own processing and the marketing by cooperatives assumed great significance in the fruit industry, where, historically, the increasing cost of the mechanical equipment required to process and pack for market and satisfy stringent standards gradually forced the great majority of growers into cooperative associations equipped to perform these services and to market the products in the great consuming centers. Eighty per cent of the citrus fruit grown in Arizona and California is marketed through grower cooperatives (*Latimer* v. *United*

States, 52 F. Supp. 228 (S.D. Calif.) as is one-third of the fruit grown in Washington (*Cowiche Growers* v. *Bates,* 10 Wash. (2) 585, 117 P. (2) 624, 626. Parallel developments have occurred with respect to dried fruit.

The smaller growers' dependence on cooperatives for marketing made oppressively discriminatory employment taxes on the portion of the crop moving through cooperatives while immunizing the fruit marketed directly by the large growers. Vigorous objections were voiced as to the alleged unfairness of looking to the identity of the employer and the collectibility of the tax rather than to the impact of the tax on the small grower.

These voices did not go unheard or unheeded. When the 1939 amendments to the 1935 Act were under consideration by Congress, Representative Buck of California introduced legislation to eliminate this competitive disadvantage. His proposals are substantially embodied in what is now Section 209(1)(4) of the Social Security Act and Sections 1426(h)(4) and 1607(1)(4) of the Internal Revenue Code, 26 U.S.C. He contended that the definition of "agricultural labor" applied by the Social Security Board and the Bureau of Internal Revenue discriminated against cooperatives in favor of large producers financially able to carry through a "complete agricultural operation from producing a crop to delivering for transportation to market." As he explained it, the theory of the change in the statutory language was to establish that "what is agricultural labor is determined by the nature of the work and not by whom the man is employed. *Agricultural labor starts with planting of a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be regarded as in the nature of agricultural labor.*" 84

Cong. Rec. 6864-6865 (June 8, 1939). (Italics supplied.)

Congressman Buck's position was supported in the hearings on the amendments. It was urged strenuously that the average grower could not afford the equipment to perform various indispensable preparatory services for preparing fruit for market, including washing, grading, and processing fruits and vegetables, and was obliged either to join a cooperative to have the processing services performed or else to turn his produce over to a commercial handler for processing. In either event, his return would inevitably tend, it was argued, to reflect the cost of processing, including employment taxes. On the other hand, it was stressed at the hearings, large-scale farm or ranch operators whose volume justified maintenance of a processing or packing plant on their farms, were relieved of liability for social security taxes. See questions of Congressman Buck, Hearings, pp. 1349-1350; statement of Ivan R. McDaniel, representing the Agricultural Producers Labor Comm., Hearings, pp. 2028-2040; brief submitted by Mr. McDaniel in support of the Buck bill, Hearings, pp. 2040-2049.

The agricultural labor exception was then modified to eliminate the asserted tax inequity and competitive advantage enjoyed by the large farmers under the administrative definitions. We have already quoted from the Committee Reports on the bill (H. Rep. No. 728, 76th Cong., 1st Sess., pp. 51, 52-53; S. Rep. No. 734, 76th Cong., 1st Sess., pp. 61, 63-64) *supra* at pp. 16-17. They show conclusively that the exception was to "be broadened to include as 'agricultural labor' certain services not at present exempt, as such services are an integral part of farming activities," at least for the purpose of affording tax relief to the small farmer. For that purpose the divorce of the farmers' coopera-

tive from farming was regarded as form rather than substance. Specifically, processing of any agricultural commodity was to be exempted if performed "as an incident to ordinary farming operation;" the latter expression was "intended to cover all services of the character described in the paragraph [4] which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group." In other words, *cooperative functions are included in the norm of what is an incident to ordinary farming operations.* This is not an unprecedented view. *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 562-563. The Capper-Volstead Act, Act of February 18, 1922, 42 Stat. 388, 7 U.S.C. 291, for example, authorizes farmers to act together in associations in "collectively processing, preparing for market, handling and marketing, in interstate and foreign commerce, [agricultural] products of persons so engaged." Toward fruit and vegetable growers, even greater favor was shown, for the Reports on the Social Security Act amendments state:

> "In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute 'agricultural labor' even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits and vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a

farmer, a farmers' cooperative, or a commercial handler of such commodities."

Despite the reference to commercial handlers in the last sentence of the quotation from the Committee Reports, this court has held in *Miller* v. *Burger,* 161 F. (2d) 992, and *Miller* v. *Bettencourt,* 161 F. (2d) 995, that services in the employ of a commercial handler buying the fruit outright [5] are not excepted. The controversy between the parties hereto arises out of whether those cases constrain a denial of recognition to the classification of processing for cooperative marketing associations as farmer's work. In appellant's view, Congress clearly intended that cooperative processing be treated as an integral part of farming activities. Its explicit declaration is not to be stilled by overextending decisions to the effect that a commercial handler purchasing fruit outright is the farmer's market or a terminal market. Room for considerable difference of opinion as to a commercial handler purchasing outright and not on a fee basis may exist. Cooperatives fall in another category. See *Employment Security Commission* v. *Arizona Citrus Growers,* 61 Ariz. 96, 144 P. (2) 682, 684, recognizing the effect of the amendment on the coverage of packing house workers in the employ of a cooperative. Cooperatives are not within a fringe area but are plainly within the exception.

The 1939 amendments were specially designed to aid the small grower forced to join a cooperative, upon whom Congress thought the real incidence of the tax had fallen. *Cf. Hendricks* v. *Di Giorgio Fruit Corp.,* 49 F. Supp. 573, 575 (N.D. Calif.). Although aware that private operators have "increasingly tended to

---

[5] See Em. T—Coll. Mim. 6219, December 31, 1947, as modified by Mim. 6239, March 1, 1948, particularly par. 6 (Exhibits N and O of the transcript of the proceedings before the Referee, which is a part of appellant's answer).

buy crops in the field or on the tree" (*Fosgate* v. *United States,* 125 F(2) 775, 778 (C.A. 5), Congress rejected the thesis that the agricultural operations were cut short and that harvesting and processing were inexorably "transferred to the business field." To limit the agricultural labor exception for processing fruit to those services performed by the average grower before he parted with "title" to his crop disregards the Congressional policy concept of the role played by cooperatives and, indeed, adopts "an incident to ordinary farming operations" requirement which (a) is much narrower than the test of the Committee Reports and (b) was deliberately made inapplicable to fruits and vegetables. The limitation excludes from the "relief" the small growers who have to sell their fruit, the principal intended beneficiaries of the amendment. "To rule that exemptions in a remedial statute should be strictly construed without considering the effect of such construction on the clear purpose of the exemption would ignore the lawmakers' intent." *Hendricks* v. *Di Giorgio Fruit Corp.,* 49 F. Supp. 573, 575 (N.D. Calif.); *Waialua Agr. Co.* v. *Maneja,* 178 F. (2d) 603, 609 (C.A. 9); *McComb* v. *Hunt Foods, Inc.,* 167 F. (2d) 905, 908 (C.A. 9); *United States* v. *Colfax Grain Growers, Inc.,* 157 F. (2d) 633, 636 (C.A. 9).

B. The Regulations of the Social Security Administration and of the Bureau of Internal Revenue for the Tax Counterpart Substantially Reproduce the Language of the Authoritative Committee Reports

A casual inspection of the regulations issued by the responsible agencies covering the period beginning January 1, 1940 (Social Security Administration Regulations No. 3 (Title 20 C.F.R. (1940 Supp.)) Part 403, Section 403.808 (e)(2), (3); Treasury Regulation 106 (Title 26 C.F.R. (1940 Supp.)) Part 402, Section 208 (e)(2), (3), applicable to the Federal Insurance Contributions Act; and Treasury Regulation 107

(Title 26, C.F.R. (1940 Supp.)) Part 403, Section 208 (e)(2), (3) applicable to the Unemployment Compensation Tax) will show the fidelity and meticulousness with which the regulations follow the Committee Reports.

So far as pertinent to this case, these regulations uniformly provide:

> "(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer or a farmers' cooperative, or a commercial handler of such commodities.
>
> "(3) The services described . . . above do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover since the excepted services described . . . must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, book-keepers, clerks, and other office employees, even though such services may be in connection with such activities."

Since the regulations conform to the authoritative Committee Reports, of which they are a replica, in

every particular and in every detail, and are consistent with the statute, they are manifestly valid and must be upheld. A regulation cannot be overturned unless it is unreasonable and plainly inconsistent with the statute. *Com'r.* v. *South Texas Lumber Co.,* 333 U. S. 496, 501; *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 413-414; *Skidmore* v. *Swift & Co.,* 323 U. S. 134; *White* v. *Winchester,* 315 U. S. 32, 41; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *Bowles* v. *Wheeler,* 152 F. (2d) 34, 38 (C.A. 9); *State of California* v. *Fred S. Renauld & Co.,* 179 F. (2d) 605, 610 (C.A. 9); *L. Gillarde Co.* v. *Martinelli,* 169 F. (2d) 60 (C.A. 1); *Jones* v. *Gaylord Guernsey Farms,* 128 F. (2d) 1008, 1010 (C.A. 10). A regulation certainly cannot be condemned for reiterating the Committee Reports, almost *in haec verba.*

C. The Corollary of Tax Relief to Small Farmers Marketing Their Fruits Through Cooperatives Was the Withdrawal of Coverage from Workers Processing Fruit for Such Cooperatives

However reluctantly the Federal Security Agency may have reached the result in this case, it recognized that it had to yield to an unmistakable Congressional mandate expressed, to be sure, in tax consequences, but having direct benefit consequences. The scheme of the Act requires that tax and benefit administration be coordinated and that taxes be collectible where benefit coverage is sought. In coordinating the administration of Title II, the agency could not treat Section 209 (1)(4) as a completely isolated provision. It had to consider it in relation to the tax program where decision will not ordinarily be given in favor of the Government, where the legislative history is as clear as it is here, on any rule of liberal construction.

Unquestionably, Congress intended to give tax relief to small growers marketing their fruit through cooperatives. That tax relief could only be granted,

short of destroying the statutory symmetry of the program, by withholding wage credits.

Due to labor conditions, taxes were paid on Baiocchi's wages. But neither the payment of social security taxes nor the employer's willingness to pay is the criterion. The Old Age and Survivors Insurance program can only credit such earnings as constitute wages. *Cf. Punke* v. *Murphy,* 267 App. Div. 673, 675, 48 N.Y. Supp. (2) 347, 349. The considerations to be applied by the Federal Security Agency are defined in Title II of the Social Security Act. The Bureau of Internal Revenue is not authorized to accept payment with respect to wages not covered by the taxing provisions of the Federal Insurance Contributions Act. C.B. 1937-1, p. 394, S.S.T. 106.[6] Furthermore, it is not the fact that other cooperatives beside the California Prune and Apricot Growers Association have filed returns covering their processing employees.

D. Wage Credits and Five Quarters of Coverage Have Been Allowed on Account of Work Other than Processing, Such as Maintenance

The referee's opinion carefully states that the deceased wage earner was credited with wages and (five) quarters of coverage for work not directly for the benefit of the growers, such as *maintenance,* when it predominated (R. 94; Exhibits D and E in the transcript of the record, numbered pp. 73-78 in the upper right hand corner), in accordance with Section 209(c) of the Act (42 U.S.C. 409(c)); see also *United States* v. *Colfax Grain Growers, Inc.,* 157 F. (2d) 633 (C.A. 9). The court below seems to have been unaware of this credit when it listed his services as "(1) receiving and grading; (2) processing and packing; (3) shipping;

[6] Erroneous receipt of payments by government agents cannot enlarge the scope and application of the tax provisions, much less the scope of the benefit provisions. The payments were made voluntarily and without assessment by the Bureau. The remedy for erroneous payments is by claim for refund. 26 U.S.C. 1421.

(4) maintenance." Processing and marketing (shipping) services in the employ of a cooperative Congress has declared should be regarded as for the account of the growers for purposes of social security taxes. However, wherever it was at all possible in the light of declared Congressional policies to regard the cooperative as an insulator and terminal point for agricultural labor distinct from the farmers, this was done and reflected in the wages credited to deceased wage earner.

E. Within the Framework of the Congressional Definition of "Agricultural Labor," a Farmers' Marketing Cooperative Is Not a Market, Much Less a Terminal Market

Although the court below observed that the cooperative "serves as a marketing organization for twenty-eight local non-profit corporations, hereafter called locals, through which individual grower members handle their produce," it nevertheless concluded, without further discussion, that "decedent worked for a terminal market for distribution for consumption after the dried fruit had reached the grocer's [sic] or terminal market," on the assumption that employment in the processing and packaging plant of a cooperative was *identical* for the purposes of the Social Security Act with employment in the plant of a commercial handler. Obviously the court was referring to the *physical operations* and dismissed the different natures of the employers and the different interests of the growers in the fruit as inconsequential. However, "seemingly inconsequential differences often require diverse results," "not to make subtle or technical distinctions or to deal in legal refinements," but to respect the legislative policies of Congress. *Pacific Coast Dairy* v. *Department of Agriculture,* 318 U.S. 285, 295-296. "These agricultural cooperatives are the means by which farmers and stockmen enter into the process-

ing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment. . . . When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price." *United States v. Rock Royal Co-Operative,* 307 U.S. 533, 563, *et seq.*[7]

The court below thus overlooked what Congress regarded as fundamental, crucial differences in the relationships between producers and cooperatives and producers and commercial handlers processing commodities for their own accounts. As this court has stated, the producer who markets by sale to a commercial handler has divested himself of all economic interest in his produce. In contrast, the cooperative itself, though a separate legal entity, stands in the position of its producer members, and is not in fact or from the Congressional point of view, as expressed in this legislation, either the producer's market or the terminal market. It is in recognition of this distinction in relationships, we submit, that the statute designates a "market" as the point between covered employment and "agricultural labor." Congress not

---

[7] The Growers' Prune Marketing Agreement with the Local (Exhibit K of the transcript, R. 178—) states that the grower recognizes "that the Local has or will become a member of the California Prune and Apricot Growers Association and has or will contract with the California Prune and Apricot Growers Association to deliver all of the prunes handled by it to the California Prune and Apricot Growers Association *for packing and marketing.*" (Italics supplied). The Local-Central Contract (Exhibit L of the transcript, R. 179—) is replete with statements that the purpose was to unite in marketing the growers' products. The Association's articles of incorporation (Exhibit U of the transcript) disclose the same purpose, as do its by-laws (Exhibit V of the transcript).

only differentiated cooperatives from commercial handlers, but understood that cooperatives assisted farmers in marketing their crop without constituting journey's end. *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, 559.

The court below also fell into error in positing that the fruit was ready for market when it was delivered to the cooperative and that the price therefor was then ascertained or ascertainable. These independent findings are contradicted in the record and are refuted by the facts notoriously prevailing in the fruit and vegetable branch of agriculture. The fruit may have been "merchantable" in the terms of the cooperative agreement, *i.e.,* ready for sale in bulk to processors; it was not ready for market any more than uncleaned beans. T. O. Kluge, general manager of the Association, testified (R 148) that the "demand and trade custom at the present time" is that prunes be graded for quality and size, sterilized, and put into consumer packages, before being marketed. These are the processing services performed by the Association. In fact, the fruit is not marketable as turned over to the Association and the price is not fixed. These erroneous findings may account for, or stem from, the court's unrealistic view that a California cooperative marketing association is the grower's market and a terminal market. In any event, it misconceived the functions of a cooperative and the Congressional policies pervading the 1939 expansion of "agricultural labor."

The premise that a California cooperative marketing association is the grower's market and a terminal market is ingenuous but unsound realistically and economically, as Congress well knew when it defined "agricultural labor" in the 1939 amendments to substitute an altogether different view of cooperatives. Admittedly, exclusion from "wages" of the compensa-

tion for services rendered in a city, remote from the farm where the crop was harvested, "as agricultural labor," is anomalous. The operations were performed *under conditions similar to* those in the plant of a commercial handler. However, unlike the *Burger* and *Bettencourt* cases where the packing was done for Rosenberg Bros., one of the world's largest commercial handlers, which purchased fruit outright, the services here were for a farmers' marketing cooperative which cannot be described as a terminal market, or any kind of market. It functions primarily as a marketing agency of the farmers, whose concern over the return on the product is not at an end when the fruit reaches the cooperative for the obvious reason that their worries have just begun. The farmers' returns are not ascertainable until the marketing agency has disposed of the fruit it has to sell for the benefit of the farmers. Gerard C. Henderson, *Cooperative Marketing Associations,* 23 Col. L. Rev. 91, 102-103. Until then the return is subject to all the vagaries and fluctuations of the market, and the grower has not parted "with economic interest in its future form or destiny." *Burger* v. *Miller,* 66 F. Supp. 619, 626 (S.D. Calif.), affirmed 161 F. (2d) 992 (C.A. 9). This court agreed that Rosenberg Bros. was a market because, and only because, the grower parted with his economic interest in the fruit at the time of delivery. This was the pivotal circumstance. If he had retained such interest, it would have disagreed, for self-evidently its test would not have been satisfied. That the farmers receive advances doesn't mean their price is determined. The advances are only tentative. If they exceed the selling price, the recipients are liable for the difference. *California Raisin Growers* v. *Abbott,* 160 Cal. 601, 117 Pac. 767; *California Bean Growers Assn.* v. *Williams,* 82 Cal. App. 434, 255 Pac. 751; *Arkansas Cotton Growers*

Co-op. Assn. v. *Brown,* 179 Ark. 338, 16 S.W. (2) 177, 178; *Tomlin* v. *Petty,* 244 Ky. 542, 51 S.W. (2) 663; *Texas Certified Cottonseed Breeders' Assn.* v. *Aldridge,* 122 Tex. 464, 61 S.W. (2) 79.

The contracts between the growers and the locals on the one hand, and between the locals and the central sales agency on the other are merely parts of an arrangement by which the growers transfer the "title" to the fruit, for marketing purposes, to an association they have organized and that they control. The purpose of the arrangement was to create an agency with absolute power to handle and market the growers' produce without interference by any grower in the manner of handling and marketing "and yet with an ironclad agreement that the agent should have no profit, but account to the grower for the full proceeds of the sale of his property, less the costs and expenses of handling and selling." *City of Owensboro* v. *Dark Tobacco Growers Assn.,* 222 Ky. 164, 300 S.W. 350, 352.

To function efficiently, to eliminate the possibility of favoritism in marketing, and to insure to each member a fair and equitable share of the proceeds of sale, the central sales agency is empowered to pool and mingle the fruit delivered to it by its members. If it had been intended to vest absolute title to the fruit in the central sales agency, it would have been superfluous to incorporate the provision that it should have the power to borrow money on the security of the prunes sold to it. *Marketing Assn.* v. *Manning,* 96 Colo. 186, 188, 40 P. (2) 972; *City of Owensboro* v. *Dark Tobacco Growers Assn.,* 222 Ky. 164, 300 S.W. 350, 352. The provision was not mere surplusage.

Section 1192 of the California Agricultural Code, under which the central sales agency and its locals are organized, provides that such associations are not organized to make profit for themselves or for their

members as such, but only for their members as producers. Their articles of association provide that they are nonprofit and cooperative in character and that each member has an equal proprietary right in their property and assets. Under their by-laws, they may not retain any profits. It is clear, therefore, that they do not handle the fruit of their grower members for their own account.

Even though title may have passed at the time of delivery, still the arrangement is for cooperative marketing. *Rhodes* v. *Little Falls Dairy Co.,* 230 A.D. 571, 245 N.Y. Supp. 432, 434, affirmed 256 N.Y. 559, 177 N.E. 140. A marketing cooperative is merely the marketing agent of the associated member farmers.

Manifestly, it gets no greater title than is necessary to accomplish its purpose, the power to give a full and unincumbered title, for convenience in financing and in marketing operations. *California & Hawaiian Sugar Refining Corp., Ltd.* v. *Com'r.,* 163 F. (2d) 531 (C.A. 9), cert. den. 332 U.S. 846; *San Joaquin Valley Poultry Prod. Assn.* v. *Com'r.,* 136 F. (2d) 382 (C.A. 9); *Bogardus* v. *Santa Ana Walnut Growers Assn.,* 41 Cal. App. (2) 939, 108 P. (2) 52; *Farmers Cooperative Co.* v. *Birmingham,* 86 F. Supp. 201, 215-216 (N.D. Iowa); *Bowles* v. *Inland Empire Dairy Association,* 53 F. Supp. 210, 220 (E.D. Wash.); *City of Owensboro* v. *Dark Tobacco Growers Assn.,* 222 Ky. 164, 300 S.W. 350; *Texas Certified Cottonseed Breeders' Assn.* v. *Aldridge,* 122 Tex. 464, 61 S.W. (2) 79, 82-83; *Yakima Fruit Growers Assn.* v. *Henneford,* 182 Wash. 437, 47 P. (2) 831. It is an agent rather than a "buyer" in any real or statutory sense. *Kansas Wheat Growers' Assn.* v. *Board of Com'rs,* 119 Kan. 877, 241 Pac. 466, 467. Services for the Association were economically for the account of the grower, although the worker was an employee of the Association,

within the *Burger* test, and were an incident to preparation for market, within the statutory test. Hence its treatment as exempt from income tax under 26 U.S.C. 101 (12). Cooperatives were organized for the purpose of avoiding exploitation by middlemen. *Cooperative Marketing, A Report on the Development and Importance of the Cooperative Movement,* Federal Trade Commission, 70th Cong., 1st Sess., Sen. Doc. No. 95 (Report on Cooperative Marketing of Farm Products), pp. XLII-XLIII.

The central sales agency and its locals handle the fruit of their grower members, not on their own account, but for the account of the grower members. The latter do not part with all or any appreciable economic interest in the fruit, its future form or destiny, when they deliver to the central sales agency or its locals. They retain an equitable interest in the fruit until it is sold by the central sales agency. Thereafter, they have an interest in the proceeds until distribution to them. See cases cited *supra,* p. 43. "The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its members, who were all either growers or landlords." *City of Owensboro* v. *Dark Tobacco Growers Assn.,* 222 Ky. 164, 300 S.W. 350, 352. ". . . the cooperating members are the real parties in interest in any transaction undertaken by their association." Gerard C. Henderson, *Cooperative Marketing Associations,* 23 Col. L. Rev. 91, 111, quoted with approval in *Tobacco Growers' Coop. Assn.* v. *Jones,* 185 N.C. 265, 117 S.E. 174, 182.

The legislative history clearly discloses that what the ordinary producer or grower himself does is not the measure of agricultural labor but what he does,

either by himself or through a cooperative or a group. We do not have the benefit of an analysis by the court below but it is apparent that its conclusion loses sight of the main purpose of the amendments, tax relief to the small grower. The "nature of the work modified by the custom of doing it" is no longer a tenable touchstone of coverage if it entails taxes on the processing and shipping employees of a cooperative. As a tax relief measure, Congress exempted services in preparation of fruit for market, regardless of the identity of the employer. Consequently, preoccupation with the activities of the "ordinary" grower or producer instead of with the marketing realties which have impelled the organization of cooperatives defeats the fundamental reason for the amendment. House Report 728, *supra,* p. 17, specifically states, by way of example, that the exception extends to services performed in the sorting or grading of citrus fruits by employees of commercial handlers. We may assume without conceding that only commercial handlers who delayed their purchase of the fruit until the processing was completed were meant, as this court seems to have held in the *Burger* and *Bettencourt* cases, but the significance of the illustration remains. Even the narrower exemption for agricultural commodities generally was "intended to cover all services which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group . . ." (Committee Reports, *supra,* pp. 17, 32). This is an unequivocal declaration that the ordinary grower's activities are not the measure even under the "incident to ordinary farming operations" requirement applicable to commodities other than fruits and vegetables.

Plainly, it was intended that services performed in the handling, processing, etc., of fruits and vege-

within the *Burger* test, and were an incident to preparation for market, within the statutory test. Hence its treatment as exempt from income tax under 26 U.S.C. 101 (12). Cooperatives were organized for the purpose of avoiding exploitation by middlemen. *Cooperative Marketing, A Report on the Development and Importance of the Cooperative Movement,* Federal Trade Commission, 70th Cong., 1st Sess., Sen. Doc. No. 95 (Report on Cooperative Marketing of Farm Products), pp. XLII-XLIII.

The central sales agency and its locals handle the fruit of their grower members, not on their own account, but for the account of the grower members. The latter do not part with all or any appreciable economic interest in the fruit, its future form or destiny, when they deliver to the central sales agency or its locals. They retain an equitable interest in the fruit until it is sold by the central sales agency. Thereafter, they have an interest in the proceeds until distribution to them. See cases cited *supra,* p. 43. "The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its members, who were all either growers or landlords." *City of Owensboro* v. *Dark Tobacco Growers Assn.,* 222 Ky. 164, 300 S.W. 350, 352. ". . . the cooperating members are the real parties in interest in any transaction undertaken by their association." Gerard C. Henderson, *Cooperative Marketing Associations,* 23 Col. L. Rev. 91, 111, quoted with approval in *Tobacco Growers' Coop. Assn.* v. *Jones,* 185 N.C. 265, 117 S.E. 174, 182.

The legislative history clearly discloses that what the ordinary producer or grower himself does is not the measure of agricultural labor but what he does,

either by himself or through a cooperative or a group. We do not have the benefit of an analysis by the court below but it is apparent that its conclusion loses sight of the main purpose of the amendments, tax relief to the small grower. The "nature of the work modified by the custom of doing it" is no longer a tenable touchstone of coverage if it entails taxes on the processing and shipping employees of a cooperative. As a tax relief measure, Congress exempted services in preparation of fruit for market, regardless of the identity of the employer. Consequently, preoccupation with the activities of the "ordinary" grower or producer instead of with the marketing realties which have impelled the organization of cooperatives defeats the fundamental reason for the amendment. House Report 728, *supra,* p. 17, specifically states, by way of example, that the exception extends to services performed in the sorting or grading of citrus fruits by employees of commercial handlers. We may assume without conceding that only commercial handlers who delayed their purchase of the fruit until the processing was completed were meant, as this court seems to have held in the *Burger* and *Bettencourt* cases, but the significance of the illustration remains. Even the narrower exemption for agricultural commodities generally was "intended to cover all services which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group . . ." (Committee Reports, *supra,* pp. 17, 32). This is an unequivocal declaration that the ordinary grower's activities are not the measure even under the "incident to ordinary farming operations" requirement applicable to commodities other than fruits and vegetables.

Plainly, it was intended that services performed in the handling, processing, etc., of fruits and vege-

tables constitute agricultural labor, even though they are not ordinarily performed by the employees of a farmer or farmers' cooperative, provided they are rendered as an incident to their preparation for market. Therefore, the place at which they accumulate for distribution into the usual channels of commerce and consumption is the market contemplated by the amendment. For agricultural commodities other than fruits and vegetables, the services must be performed before they reach the market and be for a farmer or farmers' cooperative or group and of a character ordinarily performed by the employees of a farmer or a farmers' cooperative, to come within the exception. Fruit and vegetable processing before the market is reached is excepted even though the fruits and vegetables are not in the form in which they are customarily sold or disposed of by the ordinary producer or grower, and the market is not what has been designated as the grower's market but where the fruits and vegetables accumulate in storage for distribution into the usual channel of commerce and consumption. It is impossible to give the functional integration of cooperative processing due effect if a cooperative marketing association is itself regarded as the market. The relief to small growers would then have been still-born.

While the expression "terminal market" is not defined in the statute or the Committee Reports, it is obviously not the first market. It is commonly used to refer to the point at the end of a rail or truck movement where agricultural commodities are concentrated for distribution to the consumer or one of the great wholesale markets in consumer sections of the country. *Claim of Lazarus,* 268 A.D. 547, 52 N.Y. Supp. (2) 682, affirmed 294 N.Y. 613, 64 N.E. (2) 169; *cf. State ex rel. Beck* v. *Kansas City,* 148 Kan. 623, 84 P. (2) 409, supp. 149 Kan. 252, 86 P. (2) 476; see authorities collected

pp. 52-53, Appellant's Brief in *Miller* v. *Burger,* C.A. 9, No. 11480.

In the specialized parlance of marketing, obviously familiar to Congress from its studies of agriculture, there is no support for the contention that Baiocchi's services were rendered after the dried fruit on which he worked had reached "a terminal market for distribution for consumption," and therefore had exceeded the limit set by the last sentence of Section 209(1)(4). No stretch of the phraseology would identify the great railroad terminal market where wholesalers buy at auction for resale to retailers with the position of a farmers' marketing cooperative. All the authorities define a terminal market, in contradistinction to a primary market, as the point—generally at the end of a rail or truck movement—where produce is concentrated for distribution to the consumer. If there were any question of there being several kinds of terminal markets, at the producing region as well as at the end of the rail movement, the phrase "for distribution for consumption" would dispel it for present purposes.

We submit that because of the inherent force of the phrase "terminal market," followed as it is by "distribution for consumption," and because of the manifest legislative intention, the fruit must be held to have reached a terminal market only after it has reached the great wholesale markets in consumers' sections of the country as distinguished from markets in the area of production. (In truck farming, the two tend to merge). The terminal market is the *outside limit* beyond which fruits and vegetables are not processed as an incident to their preparation for market; whatever processing or reprocessing is performed thereafter is in covered employment, even though similar in character to that performed prior to rail movement, and, except for the marketing qualification, otherwise within the definition

of agricultural labor. The Congressional purpose was to lay down on an equal basis at the critical point for price determination—the place of distribution for consumption—all fruit, regardless of whether the grower markets it directly or through a cooperative, without requiring any portion of the crop to be burdened with a tax assessment from which the rest is free.

The Appellate Division of the Supreme Court said in *Claim of Lazarus* (268 A.D. 547, 554, 52 N.Y. Supp. (2) 682, 687):

> "The elevator is not a terminal market in the proper sense of the term. A terminal market is the place of business to which products are shipped in a sorted, graded, packaged condition, ready for immediate sale. If the product in the course of shipment, reaches a warehouse in its raw or natural state, or partially sorted, but not yet fully processed and approved for public sale according to law, it is not yet prepared and ready for market; the intermediary warehouse, like the elevator, is not the 'terminal' delivery point for such products. After the product has been further completely processed, it is deemed prepared for 'market' and then and then only is ready 'for distribution for consumption.'"

If it be considered that the large grocery chains and other retailers or wholesalers to whom the California Prune and Apricot Growers Association sells its finished products are not terminal markets, the conclusion logically to be drawn is not that the point at which such products are being prepared for the growers' market is the terminal market but that the products are distributed to consumers without ever reaching a terminal market. It is unnecessary to invent terminal markets where Congress has not declared that somewhere along its passage to the consumer fruit necessarily hits a terminal market.

While to be exempt as agricultural labor the services must, under paragraph 1 of Section 209(1), be per-

formed "on a farm," under paragraph (2), "in the employ of the owner or tenant or other operator of the farm," or under paragraph (4), except for fruits and vegetables, "as an incident to ordinary farming operations," with respect to fruits and vegetables no such restrictions are imposed. In processing fruit, the work need not be performed on a farm, in the employ of the operator of the farm, nor as an incident to ordinary farm operations. Congress deliberately dispensed with these requirements for services incident to the preparation of fruits and vegetables for market. In the knowledge of the administrative construction of the 1935 Act classing services performed for cooperative plants as employment, Congress wrote into the amendments a definition removing their employees from the coverage of the Act by adopting as the test the "nature of the work" rather than the character of the employer. It is significant that, since the 1939 amendments, unsuccessful attempts have been made to restore coverage under the Act to employees of the dried fruit packing industry. See H.R. 4018 and H.R. 4175, 78th Cong., 2d Sess. (See also H.R. 169, 80th Cong., 1st Sess., introduced January 3, 1947).

F. *Miller* v. *Burger* and *Miller* v. *Bettencourt* Are Clearly Distinguishable. *North Whittier Heights* v. *N.L.R.B.* Is Inapplicable Where Congress Has Itself Given "Agricultural Labor" an Artificial Statutory Definition Departing from Previous Decisional Law

In the district court in the *Burger* case, Judge Mathes held that Rosenberg Brothers, which purchased from growers fruit which was pitted and dried, stored the fruit and then packed, sold, and delivered it to wholesale and retail outlets as required, was both the terminal market and the growers' market, proceeding on the assumption that "the 'market' Congress meant is the growers' market—the place or point where and the time

when the ordinary producer or grower of the commodity customarily parts with economic interest in its future form or destiny." Up to that time, he reasoned, "services performed by anyone *for the account of the grower or producer* stand exempt from employment taxes as being 'agricultural labor.' Beyond that point —beyond the normal market of the producer or grower —the commodity must bear the burden of the taxes, regardless of who owns it." It may be noted that Judge Goodman in his *Bettencourt* decision rendered the same day declined to determine that Congress when it used the term "market" meant a grower's market, and that this court agreed only in substance. The equivalence robs of meaning the statements in the Committee Reports that what growers do in a group is an incident to ordinary farming operations and that a substantial measure of relief was to be afforded. However, without rearguing the *Burger* case, when legal title passed to Rosenberg Brothers the grower parted with all his economic interest in the fruit, its form or destiny, whereas, we submit, it is stultifying to speak of a cooperative as the grower's market or to suppose that on delivery to the local the grower has parted with economic interest in the future form or destiny of the fruit. The fruit has not been safely marketed when it reaches the cooperative, and the farmer's concern with his product continues. Rosenberg Brothers processed for its sole account fruit grown by others and sold to it as a commercial packer. The sale was complete before the processing was performed. Even if it be true that "growers selling to Rosenberg's Fresno packing plant find that for dried fruit the 'terminal market and the growers' market are one,' " and that "the services of employees like Burger are performed not for the account of any grower, but for the sole account of a commercial handler engaged in the middleman business of

placing the dried fruit in channels of distribution for consumption," every item of the description is at variance with the operations of a marketing cooperative, which is not a market but a step toward the market, which performs processing for the account of its members and at their expense, which operates as a cooperative and not as a commercial handler nor in any middleman business.

A farmer's marketing problem is only just beginning when his products reach the cooperative. It is not a terminal market, and not the grower's market. The events fixing the price will not occur until the cooperative makes the sales arrangements on the basis of which it is determined. The farmer's stake and interest in the disposition of the fruit continues.

This court agreed with Judge Mathes that Rosenberg Brothers' plant was a terminal market and the grower's market, "since this commercial plant was the place where the farmer producer of dried fruit customarily parted with all of his economic interest in the fruit, its future form or destiny." A cooperative is not a commercial plant and the grower has decidedly not parted with all of his "economic interest in the fruit, its future form or destiny." This court further observed that "Rosenberg was a private business corporation organized under the laws of California to conduct a purely commercial operation in the business of buying from farmers and thereafter selling the purchased product for its private profit after processing it. *All aspects of a 'cooperative' venture are missing in the relations of the Rosenberg plant to its employees and the farmer producers from whom it purchased the fruit it processed in its plant.*" (Italics supplied). 161 F. (2d) 992, at 995. The *Bettencourt* case, 161 F. (2d) 995, is inapplicable for the same reasons.

The statement in *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board,* 109 F. (2d) 76, 80, that "when the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry' " has been elevated to the status of an eternal invariant verity or judicial absolute instead of a perceptive resolution of the doubtful question whether under the National Labor Relations Act employees of a cooperative processing the fruits of members and nonmembers [8] were agricultural laborers "where the legislature has given no guides for judgment," *Board* v. *Hearst Publications,* 322 U.S. 111, 121. This resolution was susceptible of change. See *Waialua Agr. Co.* v. *Maneja,* 178 F. (2d) 603, 609 (C.A. 9). The *North Whittier* decision was predicated on *whether there was need* for the remedial provisions of the Wagner Act. The court conceded that agriculture and industry were not opposites but laid down the principle that the entry into a factory for processing and marketing confers an industry status. No clearer demonstration could be made of the inappositeness of the *North Whittier* case, for it was stated as a datum that the commodity entered the factory for processing and marketing which most assuredly concedes that the marketing was not accomplished upon receipt at the doors of the plant or even upon completion of the processing. By way of contrast, Section 209(1)(4) excepts services performed as an incident to preparation for market and draws no hard and fast line between what the individual farmer can do for himself and what he can do through a great cooperative selling organization. The basic presuppositions and objectives of the Wagner Act and

[8] In the *Burger* case, 161 F. (2d) at 994, the North Whittier Association was apparently regarded as a commercial packing house. Unlike the California Prune and Apricot Growers Association, its facilities were available to nonmembers.

the 1939 amendments to the Social Security Act are totally different. The objects of Congressional solicitude in the Wagner Act were the workers, in the 1939 amendments, the small farmer. What this court said in the *North Whittier* case, at p. 79, may be repeated:

> "The pursuit of definitions of 'agricultural laborers' through the cases leads to confusion because generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent."

Moreover, "agricultural laborer" on its face seems inappropriate to describe workers in occupations so integrated with farm activities that "agricultural labor" might cover them.

Properly understood the *North Whittier* case supports the position of appellant. It stands for no such proposition as that a Congressional mandate may be whittled away.

Thus the interpretation of Section 209(1)(4) has been vastly simplified by the events preceding its adoption. It is not comparable to the task of reconstructing presumed motivation faced in *Fosgate Company* v. *United States,* 125 F. (2d) 775 (C.C.A. 5), cert. den. 317 U.S. 639; *Batt* v. *United States,* 151 F. (2d) 949 (C.A. 9); *Latimer* v. *United States,* 52 F. Supp. 228 (S.D. Calif.); or in *North Whittier Heights* v. *National Labor Relations Board, supra,* all presenting the problem of defining the scope of the term "agricultural labor" (or "agricultural laborers") which was left conveniently *vague* in the spirit of compromise and to leave the thornier, more controversial, questions open. The courts are relieved from looking to the common denominator of *need for benefits* in the absence of clearly defined boundaries established by the legislature or of groping for reasons, such as reporting difficulties of a small farmer using seasonal labor, which are at best con-

jectures. The task here is the simpler and narrower one of applying a specific legislative amplification of that term and of resolving any remaining ambiguities in the light of its purpose and evolution, as shown by the abundant legislative materials available. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.,* 338 U.S. 355, 363.

The previous regulations and judicial definitions sparked a reaction and in 1939 Congress undertook to define the term "agricultural labor" for itself. Its definitions and the regulations issued hereunder control the disposition of this controversy. When the statute contained no definition, the agencies and courts had to formulate their own, having due regard for the legislative objectives. But where a statute defines the meaning of its words, the particularized statutory definition is the point of departure and supersedes inconsistent decisional glosses. Neither definition by the average man nor recourse to customary usage may replace the definition of the lawmakers. *Western Union* v. *Lenroot,* 323 U.S. 490, 502; *Fox* v. *Standard Oil Co.,* 294 U.S. 87, 95; *Emery-Bird-Thayer Dry Goods Co.* v. *Williams,* 98 F. (2d) 166, 170 (C.A. 8); *Von Weise* v. *Comr.,* 69 F. (2d) 439, 441 (C.A. 8).

In *In re Lazarus,* 294 N.Y. 613, 64 N.E. (2) 169, affirming 268 A.D. 547, 52 N.Y. Supp. (2) 682, and *Michigan Unemployment Compensation Commission* v. *Unionville Milling Co.,* 313 Mich. 292, 21 N.W. (2) 135, both cases involving changes made in State unemployment compensation acts to bring them into harmony with the Federal act (subchapter C, Chapter 9, of the Internal Revenue Code, 26 U.S.C. 1607(1)(4)), the courts concluded that services performed for commercial bean processors were within the term "agricultural labor" as redefined in the statute. Because

the services in these cases were for the account of the growers, Judge Mathes said in the *Burger* case, 66 F. Supp. 619, 627, that their results were not inconsistent with his own. In bygone days, farmers cleaned their own beans. More recently, the cleaning of beans has been separated from their cultivation. The conclusions of these respected state tribunals are entitled to great respect in view of the close analogy between the dried bean processing and the dried fruit processing. In the *Unionville Milling Company* case, the court attached no importance to the fact that the services of the bean pickers were sometimes rendered after the company had bought the beans.

Here, too, the language of the statute and the regulations is plain and constrains the conclusion that the wage earner's services after December 31, 1939 were excepted agricultural labor.

The evidence before the referee shows that modern merchandising methods and standards have altered the marketing of dried fruit. The consuming public has become more exacting. The cooperative was organized to process fruit and find markets for the farmers. The cooperative cannot be a market or a terminal market fixing prices rather than a point of assembly in the producing region. The cooperative's processing was essential to put the dried fruit in a form acceptable to consumers. It is unacceptable in the form it is purchased from farmers; without the cooperative's services the fruit could not be marketed. Consequently, Baiocchi's services for which wage credits were denied were incidental to the preparation of fruit for market and were properly classified as agricultural labor.

The Michigan and New York courts have rejected the construction urged upon them by the state administrative agencies that "market" in the phrase "incident to the preparation . . . for market" means

the farmer's market and that the market contemplated was the place where the farmer transferred title. If the processor's plant were the market, and services performed thereafter in grading and packing fruits and vegetables were not incident to their preparation for market, the effectiveness and reach of the 1939 amendment would have been cut drastically. The Congressional purpose of assisting the farmer would be frustrated and its policy of exempting the marketing of fruits (because farming is an integrated operation in which the farmer's return—the price in the consumer's wholesale markets less the costs up to that point—was decreased by employment taxes en route to market) would be ignored. The marketing point to which Congress declared it essential to maintain equality was where the farm products in a state acceptable for consumption entered into distribution for consumption. To stop at the point where ordinary farmers have to sell their produce before it is in fact marketable disregards the fact that although anything is marketable at a *distress price,* Congress' point of reference was an active market at destination which does not discount unduly for the state of the produce. It perpetuates the tax inequities which the 1939 amendments were designed to eliminate and substitutes an approach to the small growers' marketing problems in open conflict with the relief Congress afforded.

Nothing turns upon the fact that fruit was dried before reaching the locals, as the courts recognized in the *Burger* and *Bettencourt* cases. It is well settled that administrative regulations are entitled to great weight and, unless contrary to legislative intent, are to be upheld. Cases *supra,* p. 36. And the Committee Reports explaining the 1939 amendments specifically state that the preparation of fruits and vegetables for market, whether perishable or not, is included in the

expanded definition of agricultural labor, regardless of whether performed for a farmer or a farmers' cooperative. The regulations are entirely consistent with the legislative intention and represent a conscientious endeavor to subordinate the Federal Security's Agency's own often expressed views as to the desirable scope of the act to the clearly expressed mandate of Congress.

Point II

THE ADMINISTRATIVE REGULATIONS OF THE BUREAU OF INTERNAL REVENUE AND THE SOCIAL SECURITY ADMINISTRATION TAKE ACCOUNT OF THE NECESSITY FOR A UNIFORM ADMINISTRATION OF THE TAX AND BENEFIT PROVISIONS OF THE OLD-AGE AND SURVIVORS INSURANCE PROGRAM, EFFECTUATE THE INTENTION OF CONGRESS, ARE REASONABLE, AND SHOULD BE APPLIED

A. The Congressional Policy of Relieving Small Farmers Marketing Their Fruit Through Cooperatives from the Impact of Employment Taxes Is Abundantly Clear and Should Be Effectuated

Congress has shown its special favor for small growers. Its declaration of policy should be carried out. *Wong Yang Sung* v. *McGrath,* 70 S. Ct. 445, 451-452; *Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 351; *Johnson* v. *United States,* 163 Fed. 30, 32 (C.A. 1). Obviously, such partiality for small growers raises no serious constitutional questions. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584-585; *Tigner* v. *Texas,* 310 U. S. 141, 146; *Detroit Bank* v. *United States,* 317 U. S. 329, 337; *Dominion Hotel* v. *Arizona,* 249 U. S. 265; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92; *Florida Fruit & Produce Co.* v. *United States,* 117 F. (2d) 506 (C. A. 5); *cf. United States* v. *Colfax Growers, Inc.,* 157 F. (2d) 633 (C. A. 9). Farmers' co-

operatives have long been granted special favored treatment by Congress and the States in taxation and other fields. *Tigner* v. *Texas,* 310 U. S. 141; *United States* v. *Rock Royal Co-op,* 307 U. S. 533, 562-3; *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-op.,* 276 U. S. 71; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89. The exemption of farmers from the operation of workmen's compensation acts [*New York Central* v. *White,* 243 U. S. 188; *Ward* v. *Krimsky,* 259 U. S. 503] and of the fruit harvesting and canning industries from the Women's Night-Hour Law of California [*Miller* v. *Wilson,* 236 U. S. 373] have been sustained.

In approaching the 1939 amendment, the courts should not be so engrossed in attitudes reflected in decisional law as to neglect and mistake the rationale of the changed legislative policies. The variety of definitions of "agricultural labor" that have gained currency prove that the term is indefinite and that any attempt to apply the term requires an understanding of the statute, its background, purposes, and the administrative consequences of the competing constructions of the new definition.

Under the *1935* Act, Judge McCormick thought his was a "border-line" case, *Latimer* v. *United States,* 52 F. Supp. 228, 233 (S. D. Calif.) as did the court in *Fosgate* v. *United States,* 125 F. (2d) 775, 777 (C. A. 5) *cf. Batt* v. *Unemployment Compensation Division,* 63 Idaho 572, 123 P. (2) 1004; *In re Batt,* 66 Idaho 188, 157 P. (2) 547. See the dissenting opinion in *California Employment Comm.* v. *Kovacevich,* 27 Cal. (2) 546, 563-4, 165 P. (2) 917, 926-927:

> " . . . . packing of agricultural products is a farming pursuit. Indeed it must be so characterized in order to fall within the definition of agricultural labor where the employer is an owner or tenant . . . . packing as we have seen, by its

> very nature, is a part of the farmer's business, otherwise we leave him with his enterprise half completed. He has produced his crops but ceases to have farmer services performed when he carries his project to its logical conclusion—to the end that he had in view when he launched it,—that is, the packing and disposal of the fruits of his toil."

And in *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92, the Supreme Court said:

> "The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production."

After militant advocacy of an amendment, Congress took steps to except prospectively, from and after December 31, 1939, services in processing performed off the farm and for an employer who was not the owner or tenant of the farm. After study, the Federal Security Agency and the Bureau of Internal Revenue [9] interpreted the legislative definition in the 1939 amendments to embrace the cleaning, packing, sorting and grading of dried fruits for a farmers' marketing cooperative, recognizing that preconceptions derived from their experience in administering the 1935 Act and judicial interpretations of other social legislation had not been carried over into the amendments but had led to expansion of the agricultural labor exception. That the responsible administrative agencies deferred

---

[9] These agencies (or a predecessor) were specifically authorized to publish administrative regulations in the 1935 Act, 42 U.S.C. Sections 1008, 1108, 1302, 49 Stat. 620 at 638, 643, and 647. The 1939 amendments specifically authorized publication of regulations for Title II (42 U.S.C. Section 405(a), 53 Stat. 1368). The Bureau of Internal Revenue has similar authority for the Federal Insurance Contributions Act and Unemployment Tax Act, 26 U.S.C. Sections 1429, 1609, 53 Stat. 178, 183.

to the Congressional policy despite any reservations they may have had as to the soundness of the policy assuredly does not derogate from their rule-making authority. The duty to defer to legislative policies rests on the courts no less than administrative agencies. *Wong Yang Sung* v. *McGrath,* 70 S. Ct. 445, 452. They too should be sympathetically responsive to changes in Congressional policies, regardless of whether they expand or contract coverage, depart from judicial glosses upon other laws, or reflect debatable assumptions as to tax incidence. "The wisdom of omitting from the coverage of that Act . . . . is a matter for the Congress and not for us." *O'Leary* v. *Social Security Board,* 153 F. (2d) 704, 707 (C. A. 3).

The district court's interpretation affords no relief to the small farmer, minimizes the tax and coordination problems presented by its own construction of Section 209 (1) (4), and fails to realize that in enacting the 1939 amendments Congress regarded processing services ordinarily performed by employees of a farmers' cooperative as an "integral part of farming activities" and "as an incident to ordinary farming operations."

The Federal Security Agency in dealing daily with the old-age and survivors insurance system and processing millions of claims (see Blachly and Oatman, *Judicial Review of Benefactory Action,* 33 Geo. L. J. 1, 12, fn. 53) has acquired a familiarity with the background and objectives of the Act which cannot well be attained by a court in a single contact with a segment of a problem peculiar to the Social Security Act, in most instances under appealing circumstances inimical to the formulation of a workable general rule. If this question had first been presented in a Section 203 (d) (1) (42 U. S. C. 403 (d) (1)) deduction case, the construction urge might have been the other way. The coordinated administration and the contributory

nature of the tax and benefit provisions of the Act, a primary characteristic of the old-age and survivors insurance system, may be seriously disrupted by a court attempting to reach what it considers a desirable result but inevitably lacking the flexibility, power, experience, and resources to recast the regulations so as to achieve a stable nation-wide equilibrium in a complicated field. *Cf. Rottenberg* v. *United States,* 137 F. (2d) 850, 856 (C. A. 1), affirmed *sub nom. Yakus* v. *United States,* 321 U. S. 414; *Henderson* v. *Kimmel,* 47 F. Supp. 635, 645 (D. Kan.).

B. The Canon of Liberal Construction Does Not Justify Resistance to the Intention of Congress to Narrow Coverage

The primary rule of statutory construction is to ascertain and give effect to the will and intent of Congress, *United States* v. *N. E. Rosenblum Truck Lines,* 315 U. S. 50, 53, as disclosed by the legislative history. *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543-544. The canon of liberal construction is an auxiliary aid to discovering the intention of Congress in doubtful cases and not to thwart it or stretch coverage beyond the fair intent and purpose. *United States* v. *Colfax Grain Growers,* 157 F. (2d) 633, 636 (C. A. 9); *Damutz* v. *Pinchbeck,* 158 F. (2) 882 (C. A. 2). The courts reason from legislative premises, values, and policies and do not speculate as to the probable intent of Congress when its real intent is disclosed. In *Better Business Bureau* v. *United States,* 326 U. S. 279, 283, in commenting on taxpayer's argument that exemptions under the Social Security tax provisions should be given a liberal construction—the opposite contention to that made by plaintiff—the Supreme Court said:

> "Even the most liberal of constructions does not mean that statutory words and phrases are to be

> given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored."

As we have shown, the Congressional intention is not doubtful and cannot be varied by the rule of liberal construction. That rule itself might be applied to enlarge a remedial exception (*McComb* v. *Hunt Foods, Inc.,* 167 F. (2d) 905, 908 (C. A. 9); *Waialua Agr. Co.* v. *Maneja,* 178 F. (2d) 603, 609 (C. A. 9)) and does not point unerringly to a decision favoring coverage. The legislative history demonstrates that the tax burden on small farmers was the dominant reason for the broadened 1939 exception as reporting difficulties seem to have been one reason for the 1935 exception. Invocation of the principle of liberal construction is precluded because in Section 209 (1) (4) the special concern of Congress for small farmers prevailed over the normal preference for broader coverage, and it was from the normal preference for coverage that the principle of liberal construction derives such strength as it may have as a guide to presumed intention. The principle of liberal construction is peculiarly delusive when a benefit program is coupled with a tax program as to which the principle is not axiomatic, is somewhat sparingly followed, and has gained only hesitant acceptance. The district court unduly neglected the inquiry whether a tax might be collected from an unwilling cooperative (*cf. United States* v. *Colfax Grain Growers, Inc.,* 157 F. (2d) 633 (C. A. 9)) when it focused on the desirability of Social Security protection for packing house workers instead of deferring to the purpose of the Act as amplified by its legislative history. It seems impervious and unresponsive for the court in the face of the legislative intent to say in effect that it would require far more direct, explicit, and unequivocal language than Congress has used be-

fore it would be prepared to find a departure from the *North Whittier* approach. The 1939 amendments were a legislative rejection of that approach. *Harrison* v. *Northern Trust Co.,* 317 U.S. 476. "Precedents are without force when based upon differences and distinctions which have been destroyed by later judicial decision or by statute." *Swift & Co.* v. *Bankers Trust Co.,* 280 N.Y. 135, 144, 19 N.E. (2) 992, 996.

CONCLUSION

The services were performed for the account of the grower and as an incident to the preparation of the fruit for market. As such they were within the exception and not the coverage. The order appealed from was erroneous and should be reversed, with instructions to the district court to enter judgment affirming the decision of the Federal Security Administrator.

Respectfully submitted,

H. G. Morison,
Assistant Attorney General,

Frank J. Hennessy,
United States Attorney,

C. Elmer Collett,
Assistant United States Attorney,
Attorneys for Appellant.

Of Counsel:

Edward H. Hickey,
Hubert H. Margolies,
Attorneys, Department of Justice.

Leonard B. Zeisler,
Attorney, Federal Security Agency.

APPENDIX

Statutes and Regulations Involved

Title II, Section 205 (g) of the Social Security Act as amended, 53 Stat. 1370, reads as follows:

> Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations, and the validity of such regulations. The court shall, on motion of the Board, made before it files its answer, remand

the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Title II, Sections 209 (a) and (b) of the Social Security Act as amended (42 U. S. C. 409 (a) and (b), 53 Stat. 1373) read in pertinent part as follows:

DEFINITIONS

When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of this chapter prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either * * * except—

(1) Agricultural labor (as defined in subsection (l) of this section; * * *

Title II, Section 209 (l) of the Social Security Act as amended (42 U. S. C. 409 (1), 53 Stat. 1377) provides as follows:

(l) The term "agricultural labor" includes all service performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with

commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Social Security Administration Regulations 3 (Title 20, C. F. R. (1940 Supp.), Part 403, Sec. 403. 808 (e) provides as follows:

(e) *Services described in section 209 (l) (4) of the Act.*—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of any agricultural or horticultural commodity, other than fruits and vegetables (*see* subparagraph (2) below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by

persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2), above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the excepted service described in such subparagraphs must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transporation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 881257 605